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IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9769.

CENTRAL ROIG REFINING COMPANY and WESTERN SUGAR REFINING COMPANY, *Appellants*,

v.

SECRETARY OF AGRICULTURE, *Appellee*,

and

PORTO RICAN AMERICAN SUGAR REFINERY, INC., *Intervenor*,

and

THE AMERICAN SUGAR REFINING COMPANY, GODCHAUX SUGARS, INC., HENDERSON SUGAR REFINERY, INC., IMPERIAL SUGAR COMPANY, INLAND SUGAR COMPANY, THE NATIONAL SUGAR REFINING COMPANY, REFINED SYRUPS AND SUGARS, INC., REVERE SUGAR REFINERY, SAVANNAH SUGAR REFINING CORPORATION, and WESTERN SUGAR REFINERY, *Intervenors*.

Appeal From an Order of the Secretary of Agriculture and Petition to Review the Order.

JOINT APPENDIX.

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1 **EXCERPTS FROM TESTIMONY AND PROCEEDINGS**

December 18-19, 1947

BEFORE:

Glen J. Gifford, Hearing Examiner.

APPEARANCES:

John C. Bagwell, Head Attorney, Office of the Solicitor, U. S. Department of Agriculture, Washington, D. C., counsel for Representative of Department of Agriculture.

Arthur L. Quinn, 1625 K Street, Northwest, Washington, D. C., Co-counsel Porto Rican American Sugar Refinery, Inc.

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Frederic P. Lee, 1200 18th Street, Northwest, Washington, D. C., attorney for Central Roig Refining Company of Humacas, Puerto Rico.

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2 C. Keating Bowie, Jr., 909 Mercantile Trust Building, Baltimore 2, Maryland, Attorney for Eastern Sugar Associates (a trust).

J. B. Garcia-Mendez, San Juan, Puerto Rico, Attorney for Igualdad-Western, of Mayaguez, Puerto Rico.

PROCEEDINGS

* * * * * * * * * * *

15 **Chester E. Davis** was called as a witness and, having been first duly sworn, was examined and testified as follows:

The Witness: May I proceed, sir?

Presiding Officer Gifford: Go ahead and give your name and representation first.

The Witness: Mr. Presiding Officer, my name is Chester E. Davis. I am employed by the Sugar Branch, Production and Marketing Administration, U. S. Department of Agriculture.

* * * * * * * * *

The Witness: Direct consumption sugar is of three kinds: (1) refined, (2) turbinado (semi-refined), (3) raw sugar for direct consumption, that is, raw sugar brought in by the tobacco trade and other industries using raw sugar in the manufacture of their products.

* * * * * * * * *

As against the maximum quantity of 126,033 short tons of direct-consumption sugar which may be brought in from Puerto Rico during the calendar year 1948, the potential capacity to produce this type of sugar is equal to approximately 484,982 short tons as shown by a recent survey made by the Production and Marketing Administration field office in Puerto Rico in October of this year.

A table showing the 1947 refinery capacity for each individual refiner is herewith submitted for the record. [See Exhibit 4]

* * * * * * * * *

The Witness: Although Puerto Rican refiners annually distribute for local consumption from 75 to 90 thousand short tons of refined or turbinado sugar, this amount, together with the direct-consumption quota of 126,033 short tons which may be shipped to the United States during a calendar year, is well under the capacity of the refineries.

Thus, it may be logically assumed that without the establishment of marketing allotments disorderly marketing of Puerto Rican direct-consumption sugar in the continental United States would result and some refiners would be deprived of their right to market a fair and equitable share of the direct-consumption quota.

In regard to the manner in which allotments should be made, the first standard stated in Section 205(a) of the Act, namely, the processings of sugar to which proportionate shares, established under the Act, pertain, is inapplicable to the allotment of that portion of the quota which may be filled by direct-consumption sugar.

This conclusion is based upon the following circumstances:

1. The great majority of the producers in Puerto Rico who process sugarcane to which proportionate shares pertain do not produce direct-consumption sugar, and

2. Some of the refiners who produce direct-consumption sugar do not process sugarcane to which proportionate shares pertain, but purchase raw sugar for their operations.

Therefore, it is concluded that a fair, efficient, and equitable distribution of the direct-consumption portion of the quota could not reasonably result from the utilization of this standard.

Therefore, the Department's proposal is that the 126,033 short tons of sugar, raw value, be allotted on the basis of the other two standards, namely, "past marketings" and "ability to market" such sugar.

Equal weight is given to each of these standards. It is proposed to measure "past marketings" by using each refiner's average deliveries of such sugar during the period 1935-1941 and to measure "ability to market" on the basis of the highest one-year deliveries of direct-consumption sugar to the continental United States by each refiner during the calendar years 1935-1947, inclusive.

* * * * * * * * * * *

The Witness: Exhibit A [to the Notice of Hearing] shows the entries of Puerto Rican refined and turbinado sugar by mills in terms of short tons of sugar, raw value, for each of the calendar years 1935 to 1947, inclusive, and was compiled from official statistics of the

Sugar Branch, Production and Marketing Administration, United States Department of Agriculture.

Exhibit B, referred to in the notice of hearing, and already incorporated in this proceeding, gives the Department's proposed formula for allotting the 1948 Puerto Rican direct-consumption quota of 126,033 short tons, raw value.

As previously stated, the proposed formula gives equal weight to "ability to market" and to "past marketings."

Inasmuch as the Sugar Act assigns no weights to
22 these factors, and in view of no compelling reason at the present time for giving greater weight to one factor than another, it is believed that equal weightings are fair and equitable for the purpose of allotting the direct-consumption portion of the Puerto Rican quota for 1948.

In determining "ability to market" we have selected as a measure the marketings of each refiner during his year of highest marketings from 1935 to 1947. This measure has been selected instead of physical plant capacity because it is believed other factors, such as availability of raw materials, location of plant, sales relationships, deliveries for local consumption, etc., would have to be combined with physical plant capacity for any realistic measure of ability.

It is acknowledged that in some years prior to the war when this same quantity of direct-consumption quota sugar was allotted, the physical capacity of the plant was one of the measures used in determining "ability to market."

However, in Puerto Rican Sugar Order No. 11, issued by the Secretary of Agriculture on June 1, 1938, published in the Federal Register for June 3, 1938, the Secretary stated, and I quote:

"In determining 'ability to market', it is apparent that mill capacity alone cannot be taken as an accurate measure.

That factor represents only a potential ability to
23 produce sugar, depending upon a number of other factors such as availability of raw sugar, the price of raw materials, transportation costs, and similar factors.

An additional factor must be used in order to arrive at a true measure of ability to market."

The Secretary then went on to state that he believed that in measuring "ability to market" each processor's current marketings of sugar should be considered and given equal weight with each processor's mill capacity.

In 1938 the Department had before it only the calendar year marketings by the various refiners for the years 1935, 1936, and 1937, upon which to judge a refiner's ability to market. At this time, however, the Department has available the total marketings in the United States for the various refiners for each of the years 1935 to 1947, inclusive.

In some of the years, for example, 1940, 1942 through 1946, and in the last four months of 1939, marketing restrictions were not imposed on the individual processors and each processor has had adequate opportunity to demonstrate by performance his "ability to market." Therefore, it is believed that the highest one-year marketing during the years 1935-1947 is a fair, efficient, and equitable measure of the processor's ability to market.

"Past marketings" are measured in the proposed
24 formula in terms of the average marketings of each refiner during the prewar period, 1935-1941. It will be noted that marketings during the war and postwar years have been excluded in measuring past marketings. Such years are deemed to be unrepresentative in view of wartime shipping difficulties, Government procurement restrictions, and other wartime dislocations.

Furthermore, none of the marketings during the war period and postwar years were made pursuant to the provisions of Title II of the Sugar Act of 1937 as such provisions were suspended by Presidential proclamation on April 13, 1942, and only recently reinstated on November 28, 1947.

The wartime years are also considered undesirable because of the wartime policy of the Department to minimize interference with the prewar competitive relationships of industries.

On the basis of the foregoing proposal for 1948, it is recognized that provision is not made for the establishment of a marketing allotment for a new refiner.

However, the information available to the Department indicates that new refiners are not contemplating entering the field in 1948. The present proposed allotment is for the calendar year 1948 only and if in future years any refiner in Puerto Rico, new or old, who is without participa-
25 tion in the United States market, decides to enter the market, his request for participation in the quota in future years will, of course, be given very careful and appropriate consideration in accordance with the provisions of Section 205(a) of the Sugar Act of 1948.

* * * * * * * * * *

26 Cross Examination

By Mr. Quinn:

Q. Mr. Davis, on Exhibit 4 I would like to direct your attention to the title "Refinery Capacity". The calculations made in that Exhibit are on a five-day run, are they not? A. That is correct, sir.

Q. Will you kindly tell me why a five-day run was selected? A. We requested the head of the Puerto Rican Office of the Production and Marketing Administration to contact all of the companies, refineries, interested, and make a check—this was in October of this year—and make a check of the potential refining ability during any of the best five days in 1947 with which we could compare and be comparable in the same manner in which the ability to produce was established in the year 1938 when the five consecutive days of any ten days were used in trying to arrive at a refinery capacity.

* * * * * * * * * *

27 By Mr. Lee:

Q. Mr. Davis, do you have available figures as to the amounts of direct consumption sugar permitted to be

marketed in the continental United States, by each of the refiners listed in the hearing notice, during the years 1938 to 1947?

I recognize in asking the question that there were some years when there were no restrictions and some years when restrictions were not imposed under the Sugar Act but under other authority of the Government. A. As per your request to Mr. Bagwell yesterday, I hurriedly put together a table [Exhibit 5] showing the quantities of Puerto Rican direct consumption sugar entered into the continental United States by individual refiners, 1938-1947, and opposite those figures, the quantities alloted each refiner under applicable regulations and contracts, in terms of short tons of sugar, raw value to make as many copies as we might possibly make, but I would have no objection—as you have requested this information I have no objection whatsoever to submitting this table for the record and I have here four copies. The table just referred to shows the names of the refiners, all of the years from 1935 to 1947.

For instance, under 1935, the quantity entered and the quantity alloted by Puerto Rican sugar Order No. 3. During that year, only refined sugar, not turbinado sugar was allotted.

The other figures show that except for Puerto Rican, American and Guanica, the other entries were tur-
28 binado sugar. 1936 shows the quantity entered and quantity allotted. There were no allotments of turbinado sugar for 1936. 1937 shows the quantity entered and no allotments of the D. C. quota in 1937.

1938 shows the quantity entered and the quantity allotted by Puerto Rican sugar order No. 11.

1939 shows the quantity entered and the quantity allotted by Puerto Rican Sugar Order No. 13.

1940 shows the quantity entered and no direct consumption marketing quota restrictions under the 1937 sugar Act as amended until October 15, 1940, when the Act was again amended to include direct consumption marketing quotas for Puerto Rico.

1941 shows the quantity entered and the quantity allotted by Puerto Rican Sugar Order No. 16. It will be noted that the 1941 allotments were approved by the Secretary of Agriculture, after the interested parties had mutually agreed upon the size of each company's allotment.

1942 shows the quantity entered and no individual allotments under the 1937 Act, as title 2 suspended by Presidential Proclamation April 13, 1942, suspension was lifted on November 28, 1947. Also refiners were not given individual marketing allotments of D. C. sugar under the terms of the government purchase contract.

29 1943 shows the quantity entered and no allotments under the same terms as 1942.

1944 shows the quantity entered and the reasons for no allotments were the same as in 1942.

1945 shows the quantity entered and the same reasons as given for 1942.

1946 shows the quantity entered and no allotments were made for the same reasons as in 1942—the individual processors.

1947 shows the quantity entered and the quantity allotted under the terms of the Commodity Purchase Agreement.

In note 4 there, Article II of the Purchase Agreement states:

"If applied for by sellers, the total quantity so released to all sellers shall not be less than 130,000 short tons, raw value."

• • • • • • • • • • •

By Mr. Garcia-Mendez:

30 In Exhibit 4 I find the total of 68,367 tons for the 5-day period of April 21 to 25, 1947. Do you have any figured available to show that Igualdad during any previous year had a total capacity higher than 68,367? A. I have no figures available, sir. The only figures available were those that were submitted for the hearings in 1938, 1939 and 1941, when I believe that they were lower. The refinery capacity as shown by your company, when the

allotment was under consideration in 1939, and finally issued under Puerto Rican Sugar Order No. 13, showed 66,396 tons.

Q. In examining the table showing the quantities of sugar entered into the continental United States, we find that during the year in which there was an allocation, Puerto Rican and American Sugar Refinery delivered sugar enough to take care of their allocation. How does the sugar delivered by Puerto Rican American Sugar Refinery during the years in which there was no allocation compare with the deliveries during the allocation years? Was it more or was it less, and to what extent? A. The average deliveries of the Puerto Rican American Sugar Refinery as shown by official statistics for the Sugar Branch, Production and Marketing Administration, showed that the average deliveries for the years 1935-1941 inclusive, was 100,070 short tons, and the average deliveries for the Puerto Rican American Sugar Refinery for the years 1942 to 1947, or in other words, the war and postwar years, was 57,486 short tons raw value.

Q. How do the deliveries of Igualdad Western compare during the pre-war years and during the World War years? A. The average deliveries for the years 1935 through 1941 for Igualdad, 8,127.

The average deliveries for the years 1942 through 1947, 22,025.

Q. In your testimony, Mr. Davis, you say that the Department is giving equal weight to both ability to market and past marketing, and you further state that ability to market had several different factors to be considered. Don't you think that the ability to market should be weighed by the immediate past performance, on the basis of the U. S. Sugar Order 13 of 1939, and the theory established by the U. S. Sugar Order No. 13? A. I believe that in my statement I showed the government's position as to what should be considered, taking into consideration their ability to market. As a matter of fact, Mr. Mendez, I be-

lieve, under the government's proposal, you have been given the opportunity—and there has been selected—the best year of performance of deliveries to the continental United States as the ability to market any year from 1935 through 1937.

Q. In other words, in a 13-year span? A. In a 13-year span.

* * * * * * * * * * *

32 By Mr. Lee:

Q. As I recall it, there has not been placed in the record so far the direct consumption local figures for Puerto Rico. Do you have those figures available? A. I have those figures available for all of the interested companies I believe. However, no tables have been made of them. I would have to read them if you want them incorporated in the record from the years 1937 through 1948.

* * * * * * * * * * *

36 Mr. Quinn: I would like the record to show, Mr. Examiner, that the allocations in Puerto Rico for local consumption are not made to refiners, they are made to the raw mills, whereas the allocations under Section 205 of the 1948 Act for D. C. marketings in continental United States are made to refiners or processors of direct consumption sugar.

I wanted the record to show that.

Presiding Officer Gifford: Yes. I want you to make the record so as to protect yourself in everyway possible, and I am admitting this so if the Secretary sees fit to consider it he may do so for the purpose of determining whether the parties have the ability to supply this much sugar.

* * * * * * * * * * *

Q. Will you please read those figures into the record,

* * *

* * * * * * * * * * *

38 A. Deliveries of refined and turbinado sugar for local consumption in Puerto Rico for each of the years 1937 through 1946, inclusive:

Puerto Rican American Sugar Refinery, year 1937, 11,586; 1938, 9,004; 1939, 9,256; 1940, 10,687; 1941, 11,273.

I might add that these figures are all in terms of short tons of sugar, raw value.

1942, 10,882; 1943, 16,317; 1941, 18,147; 1943, 30,119; 1946, 30,350.

Aguirre: 1937, 680; 1938, 1,098; 1939, 1,286; 1940, 1,688; 1941, 1,043; 1942, 928; 1943, 2,383; 1944, 1,191; 1943, 256; 1946, 0.

Roig-El Ejemplo: 1937, 5,030; 1938, 6,272; 1939, 3,633; 1940, 3,069; 1941, 6,765; 1942, 7,643; 1943, 10,999; 1944, 12,015; 1945, 16,453; 1946, 17,586.

Guanica: 1937, 11,791; 1938, 7,113; 1939, 7,265;
39 1940, 7,018; 1941, 7,395; 1942, 8,565; 1943, 15,298; 1944, 13,097; 1945, 14,433; 1946, 15,725.

Igualdad Western: 1937, 0; 1938, 7,038; 1939, 4,605; 1940, 4,789; 1941, 6,564; 1942, 7,961; 1943; 11,154; 1944, 10,708; 1945, 16,436; 1946, 17,648.

Camuy: 1937, 0; 1938, 0; 1939, 1,919; 1940, 2,847; 1941, 525; 1942 through 1946, 0.

San Francisco: 1937, 10; 1938, 21; 1939, 18; 1940, 1; 1941, 54; 1942, 22; 1943, 24; 1944, 176; 1945, 16; 1946, 58.

* * * * * * * * * *

40 Q. Mr. Davis, you stated that the war and post-war years were unrepresentative of the past marketings because of wartime shipping difficulties, government procurement restrictions and other wartime dislocations. Do you know of any wartime shipping difficulties in 1947 that will not exist in 1948? A. I can't say that I do.

Q. Do you know of any for 1946 that will not exist in 1948? A. I don't believe that I can answer that statement.

Q. Do you know of any government procurement restrictions that existed in 1947, and if so would it not exist equally in 1948? A. The government, under the CCC pro-

gram, purchased the crop for 1947, and pursuant to the terms of that contract set allotments of direct consumption sugar which each refiner might bring into the continental United States. To my knowledge, I know of no contemplated purchase of the 1948 sugar crop.

Q. Was total of allotments for 1947 an amount substantially the same as the total amount to be allotted for 1948? A. They were slightly in excess. They averaged approximately 131,000 tons.

41 Q. Would your answer as to 1946 and 1948 be the same? A. The entrys of 1946 equalled 121,543 short tons.

Q. Would you say that was substantially the same as the amount to be allotted—total amount to be allotted—for 1948? A. Direct to refiners, I think the record shows that it was proposed to allot 120,864 direct to refiners, and 5,169 as raw sugar unallotted for further distribution in the United States.

Q. Do you know of any wartime dislocations that existed in 1947 that would not exist in 1948? A. I don't believe I am competent to answer that question because I don't think the war was over at that time, and in 1947 there was a great deal more freedom in the movement of sugar.

Q. Perhaps you misunderstood my question. Suppose I ask it this way: Whatever wartime dislocations if any existed in 1947, have you any reason to think that the same situation would not be true in 1948? Is there any difference between the two years so far as war time dislocations are concerned? A. I know of none except the purchase by the government itself of the 1947 sugar crop and the allocation among the two refiners of the amounts that they may bring into the United States in 1947, and allocation

42 was not pursuant nor under the terms of the sugar Act of 1937 which was then in suspense.

Q. Do you know of any wartime dislocations that existed in 1946 which would not exist in 1948? A. The purchase of the entire crop by the government.

Q. Is it your considered opinion that there is substantial difference, for purposes of making allotments under the Act, between the marketing conditions in 1946 and 1947, and those that will exist in 1948? A. I think there could have been, yes, sir.

Q. Are you of the view that there are such differences? A. I repeat myself that under the terms of the Sugar Act of 1937, as amended and extended by the Sugar Act of 1948, a criterion is set forth for the Secretary to take into account in making allotments. There is nothing in the Commodity Credit Contract with the Puerto Ricans which says that the Secretary shall and must take into consideration the division of the quota in order to effectuate a fair, efficient, and equitable allotment.

Q. Mr. Davis, you have testified in Exhibit No. 5 that for the years 1942, 1943, 1944, 1945 and 1946, that there were no restrictions upon refiners marketing of direct consumption sugar to the continental United States, and no individual marketing allotments of direct consumption sugar under terms of the government purchase contract.

43 Is it your view that when there are no restrictions or no individual allotments for a year, that that year becomes unrepresentative of marketing conditions? A. Yes, I would say, as I have already stated in my presentation, that they are unrepresentative. You had the war dislocations of shipping under the control of the Navy, you had submarine warfare, you had the purchase of all the crops, both of Cuba and Puerto Rico, by the government and the allocation of those sugars, either raw or refined, where it would do the most good in the furtherance of our war effort.

Q. It is a fact, Mr. Davis, that during those years, the government encouraged the marketing of direct consumption sugar in continental United States to the fullest extent in order to meet war needs? A. I could not answer that question, sir. I don't know.

Q. Do you know of any facts, Mr. Davis, that indicate that during those years any refiner was unable to market in the continental United States all the direct consumption sugar that he had available and chose to market in that market? A. I have no figures on that.

Q. You have no facts either? A. I have no facts that I know of.

Q. Mr. Davis, you stated in your direct testimony
44 that the Secretary of Agriculture said—and you referred to the specific order I believe in which he said it—that current marketings should be considered in connection with ability to market. Am I correct in understanding that you take a position contrary to that of the Secretary and express it as your opinion that marketings, for instance, in such years as 1935—we are talking about 1948 now—marketings in such years as 1935 should be considered rather than current marketings as demonstrating ability to market? A. I am making no statement of my own, Mr. Lee. The statement that I made is the position of the Department of Agriculture, not of just Mr. Davis.

Q. That statement of the Secretary's is that current marketings should be considered. The proposal that has been set for hearing provides that instead of current marketings, that in the case of Puerto Rican American Refining Company, 1935 marketings should be taken into account. In the case of Guanica, 1939, in the case of Roig 1940, in the case of Igualdad, 1947. Obviously, 1935 and 1935 and 1940 are not current marketings. Have you any facts as to why the Department concluded in the preparation of this proposal that marketings for such years as 1935, 1939 and 1940 were demonstrative of ability to market, rather than current marketings? A. I stated that in 1938—and this
45 is the Department's position—it had before it only the calendar year marketings for the various refiners for 1935, 1936 and 1937 upon which to judge a refiner's ability to market. At this time, however, the Department has available the total marketings in the United

States for the various refiners for each of the years 1935 to 1947 inclusive, which gives a far longer period upon which the Department could judge and have the figures before them on which to base the ability to market the sugar in the continental United States.

Q. Mr. Davis, at the time of the hearing in the late fall of 1938, and the decision of the Secretary early 1939, were not also the figures of 1938 marketing available? You may want to refer to the order to refresh your recollection. A. I believe those figures were available, yes, sir.

Q. Then let me state my question again: In 1938, when there were before the Secretary, figures as to marketings for '35, '36, '37, and '38, he chose the 1938 or current marketings as a basis for demonstrating ability to market. The proposal does not choose current marketings but those for many years prior. Do you have any facts as to why the Secretary—or the Department, perhaps I should better state—now is of the view that current marketings are not demonstrative of ability to market, but was of a view in the early period, that current marketings were
46 demonstrative of ability to market? A. I find that in Puerto Rico sugar Order No. 13 issued January 5, 1939, the years 1935, 1936, 1937, and 1938, up to October 24, were used, but I might add, as again I have previously stated, it is the Department's opinion, that, having a much longer term, namely from 1935 through 1947, upon which to base, in our judgment, the ability to perform, that we consider a more adequate measure.

Q. Would you say, Mr. Davis that by October 24, 1938, substantially all the marketings for 1938 were completed? A. Approximately, yes.

Q. Mr. Davis, what facts lead you to your expressed conclusion that marketings in 1935 are a measure of ability to market 13 years later in 1948? A. From the information available to the Department, we have no information that, in this particular case, that you mentioned—Puerto Rican American Sugar Refinery—that its ability to deliver has

lessened any during the intervening years. We do consider that in taking the highest one-years from 1935 through 1947, is the more equitable manner of determining ability to market and in giving in our proposal to each refiner the highest one-year's deliveries in any of those years 1938 to 1947 inclusive some of them which were under re-
47 strictions, some of them which were without restrictions, and permitting the use of that highest year is deemed to be fair and equitable.

Q. Would your answer be the same as to the use of the year 1939 for Guanica and the year 1940 for Roig? A. Yes, sir.

Q. Mr. Davis, have you made any inquiry as to the fact as to whether there have been any changes since 1935 that might affect marketing conditions, so that 1935 would not be representative of ability to market in 1948? A. Specifically what?

Q. I merely want to know whether you had made any investigation of the facts so as to know whether any existed to show that marketing in 1935 was not the measure of ability to market in 1948? A. In October of the year 1947, we had the Puerto Rican field office check the refinery capacity which was submitted as exhibit No. 4, and which I think is self-explanatory.

* * * * * * * * * *

48 Q. Did I correctly understand you, Mr. Davis, to state that so far as you were aware, there had been no change in refining capacity since 1935? A. I did not make that statement. I said that we had submitted exhibit 4 showing 1947 refinery capacity, and in that exhibit 4, with regard to Camuy it is stated "No data received from Central Camuy on its 1947 rate of production." I have no authoritative statement to the effect that Camuy is not now acting as a refinery. I have been given to understand and I think their record of deliveries both for local consumption and for direct consumption deliveries to the United States during the past seven or eight years would

lead one to believe that they no longer exist as a refinery but the government has not yet specifically asked Camuy, "Are you or are you not a refinery any longer?"

. . . . . .

By Mr. Quinn:

Q. Isn't it a fact that title II of the 1937 Act as
49 amended was suspended during all of 1946? A. That is correct.

Q. Does the Department within your knowledge contemplate suspending Title II of the 1948 Act during the year 1948? A. That matter of suspension of Title II is a matter for the President of the United States to decide and I am afraid I can't speak for him.

Q. Mr. Davis, isn't it a fact that an emergency, proclaimed by the President in the United States in 1942, existed for all of 1946? A. That is correct.

Q. Do you contemplate, from your knowledge, any emergency for the year 1948? Can you foresee any emergency on the horizon now for the year 1948? A. You are asking me a question, Mr. Quinn, about the future. Right now, as of this moment, I can only state that to the best of my knowledge, the Department sees no emergency at this time which would cause our recommending to the President the suspension of Title II of the Sugar Act of 1948.

Q. Mr. Davis, isn't it a fact that the Commodity Credit Corporation purchased all of the 1946 Puerto Rican crop? A. That is correct, except a small quantity, I believe.

Q. Do you know whether the United States contemplates purchasing the 1948 sugar crop of Puerto Rico? A. At the present moment, as I have previously stated, it is not
50 contemplated at this moment.

Q. Mr. Davis, isn't it a fact that allocation controls were exercised by the Department of Agriculture in 1946 on all Puerto Rican refiners? A. I may not be fully qualified to make that statement—to answer that question. It is my understanding that the allocations of sugar to be

made into refined sugar for direct consumption or for local consumption, was made to the raw sugar mills who in turn sold or transferred their raw sugar rights to the various refiners, who in turn notified the selling agencies in the United States insofar as selling sugar in the continental United States is concerned.

Q. Mr. Davis, isn't it a fact that war food Order No. 63, covering the shipment of every pound of Puerto Rican sugar from Puerto Rico to continental United States was in effect for the entire calendar year 1946? * * * A. I believe it was in effect.

* * * * * * * * * *

Q. Do you contemplate any similar order for 1948,
51 Mr. Davis? A. Not that I know of.

By Mr. Antonsanti:

Q. Mr. Davis, in computing your formula for ability to market— A. I didn't understand you, sir. Will you read it again, or state your question again?

Q. In preparing your formula for ability to market, what has been the result of the application of that formula to the particular refiners now interested in this proceeding? A. I take it you want to know how much each one of them—how much it is proposed that they would get under the formula?

Q. Well, no. You have taken, in ability to market, 13 years, I believe. A. The highest one-year.

Q. The highest one-year? A. That is right.

Q. Therefore, the result of the application of that formula is that every one of the refiners here, including Roig, has obtained, by virtue of that formula, the highest production in any one year? A. The highest production, no. Highest deliveries to the continental United States.

52 Q. Therefore, the application of that formula on ability to market has resulted in your taking the figure for Roig of 28,657 short tons, raw value, is that cor-

rect, in Exhibit A? A. 28,657 short tons, raw value, that is correct.

Q. And at no other period has he produced any larger amount, or delivered for direct consumption in the United States any larger amount? A. That is correct.

Q. To make it brief, the same result as to any other refiner listed in Exhibit A? A. That is correct, although I wish to call the attention of the Presiding Officer that the footnote 1 states that for for central Aguirre and to central Igualdad Western, "These figures are subject to revision when the final 1947 outturn weight and polarization officially determined."

Q. Mr. Davis, when you go back to 1935, in one case, for the application of the formula for ability to market, and in connection with your previous testimony, would it be correct to say that you go back 13 years or would it be more correct to say that you go back 5 years into a normal period, and that you have eliminated, in one case, war years? A. In determining the ability to market we have used the entire period 1935 to 1947.

Q. I am sorry. I amend the question. In past
53 marketings substituting the word "ability to market past marketings," what would be your reply? A. We used the prewar years 1935 to 1941.

Q. Did I understand you to use the words "representative period," in connection with that from 1935 to 1941? A. In my previous statement I said, "it will be noted that marketings during the war and postwar years have been excluded in measuring past marketing. Such years are deemed to be unrepresentative, in view of the wartime shipping difficulties, government procurement restrictions, and other wartime dislocations."

Q. Consequently, the periods that you picked or selected or chose were considered by you to be representative? A. They were considered by the Department to be years which in the over-all would give a fair, efficient, and equitable distribution of of the direct consumption quota of 126,033 short tons.

Q. Would it be correct to say, or have you considered, that the period 1936 to 1941 for past marketings, was a more normal period than the period 1941 to 1947? A. There is no question about it being more normal, speaking in general terms, not necessarily with reference to this, but in all respects, those years were more normal than the war years.

Q. Has it been considered by you or the Depart-
54 ment that 1947, the first postwar year is an entirely normal year and that the country has completely recovered from the effect of the war? A. In considering, this proposal 1947 was not counted as a normal year, because of the purchase of the entire crop and the allocation outside of the terms of the Sugar Act of 1937, among the various refiners.

* * * * * * * * * *

Q. As a matter of fact, during most of 1947, the country has been considered still in a state of emergency, has it not? A. I beg your pardon, sir?

Q. As a matter of fact, during most of 1947, and particularly during the first month, the country has still been considered in a state of emergency, has it not? A. With reference to sugar and Title II of the Sugar Act, the emergency was considered to exist until by Presidential Proclamation, Title II was reinstated on November 28, 1947.

* * * * * * * * * *

55 Q. And prior to that Proclamation, your Department considered sugar an emergency product? A. That is correct.

* * * * * * * * * *

56 Q. Now, Mr. Davis, going back to the questi[illegible]on were asked by Mr. Lee, whether or not in 1938, when a hearing was being conducted in the Department to determine allocations for the forthcoming year, 1939, the
57 figures then taken into consideration were for four years prior to 1939? A. They were for three years, and from January 1 to October 24, 1938.

Q. Those figures were then taken because they were current marketing figures?

Mr. Lee: Mr. Chairman, may I interrupt, I think Mr. Antonsanti has misunderstood my question. It was that the Secretary, despite the availability of figures for 1935, 1936, 1937 and 1938, took into account only 1938 figures in ascertaining ability to market.

The Witness: May I clarify that?

It is the conclusion of the Secretary—in Puerto Rican Sugar Order No. 13, issued January 5, 1939, he stated:

"(1) Past marketings during the years 1935, 1936, 1937 and 1938, up to October 24, and (2) ability to market, measured by giving three-fourths weight to the present refining capacity determined as aforesaid," and I am quoting,

"and one-fourth weight to the quantities of direct consumption sugar received for entry into the continental United States between January 1, 1938 and October 24, 1938."

By Mr. Antonsanti:

Q. Now, may I ask you if at that time the year selected as representative was a normal year? A. I would so consider it.

58

Q. Coming now to this hearing and your present formula, your answer would not be the same if you were asked to state whether or not the last years production was normal? A. I believe it would be preferable to restate that question. You make mention of the word, "production."

Q. I mean, deliveries of distribution into the United States.

The Witness: I believe Mr. Presiding Officer, I have previously answer that statement.

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By Mr. Quinn:

Q. Mr. Davis, directing your attention to that part of the formula where you selected the highest single year, on ability to market. Of the seven companies listed, isn't it a fact that the highest single year for five of those seven fall within the years 1935 to 1940 inclusive? A. No. Four do.

Q. I will amend my question: To 1941 inclusive?

59 A. That is correct.

Q. Of the other two, Mr. Davis, specifically central Aguirre and Igualdad, what year did you select? A. 1947.

Mr. Quinn: That is all.

By Mr. Garcia-Mendez:

Q. Is it not a fact that the dislocations and shipping difficulties referred to by you during the war years were equally applicable to all refiners? A. They may or may not have been applicable to the same extent to all refiners. There is no question I believe but what during the war there were many many dislocations which affected first one and first the other, either favorable or adversely depending upon the situation at the moment.

Q. In connection with the deliveries of sugar to the continental United States, were not the shipping difficulties equally applicable to all the refiners? A. I would not be in a position to answer that question.

Q. In connection with the deliveries of sugar into continental United States, were not the government dislocating regulations equally applicable to all the refiners? A. Would you repeat that question again?

Q. Is it not a fact that the dislocations for the war years were not equally applicable to the refiners insofar as the deliveries of sugar in continental United States is

60 concerned? A. I was not in Puerto Rico during the war. To my knowledge and belief, and from information that I have received at various times, I believe the dislocations to some one refiner in reference to the other, was somewhat different, and I might say particularly so that

during the wartime period the control of shipping and allocation of vessels to take out sugar from Puerto Rico, sometimes they allocated just one port and you had to go through that port, sometimes it was another, and the location of refiners closer to San Juan at some one time or other, may have been more favorably treated than others.

Q. Is it not a fact that the Puerto Rican American Refining Company is much nearer to San Juan than Igualdad Western? * * * A. I do not know, sir.

* * * * * * * * * * *

Q. Mr. Davis, is it not a fact that during the years 1942 to 1947, the maximum delivery in anyone year by
61 Puerto Rican American Refinery was in 1947 the amount of 60,820 tons, and yet in the government proposal, Puerto Rican American Sugar Refinery is allotted the amount of 79,783 tons? A. You are right. That is the proposal.

Q. Is it not a fact that during the same period the maximum deliveries of Igualdad Western was 29,965 tons in 1947, and in the government proposal the allotment made to this refinery is only 14,026 tons, or less than 50 percent of the actual deliveries during 1947? A. That is correct.

Q. Is it not a fact that during this same period, the maximum delivery of Roig El Ejemplo was 27,246 in 1947 and in the government proposal they are alloted 15,446? A. That is correct.

Q. Do you know, Mr. Davis, of any dislocation or manufacturing difficulty which prevented either of the refiners to produce as much sugar as they had a general ability to produce during the years 1942 to 1947?

* * * * * * * * * * *

62 A. Specifically, to anyone of the refiners, my answer necessarily must be no, Mr. Presiding Officer. I think I have already mentioned in my previous testimony the general wartime dislocations and I must stand on that in my previous statement.

* * * * * * * * * * *

63 The Witness: Pardon me, just a second sir. Mr. Presiding Officer, as requested before the noon recess our office has worked up the deliveries of refined and turbinado sugar for local consumption in Puerto Rico at certain mills for January 1 through November 29, 1947 in terms of short tons of sugar, 96 degree basis. * * * For 1947, the local consumption for Puerto Rican American Sugar Refining Corporation, incorporated, was 23,384 tons, Aguirre, 30 tons, Roig Refining Company, 16,675 tons, Guanica, 14,817 tons, Igualdad Western Sugar Refining Company, 16,453 tons, San Francisco, 58 tons, total 70,417 short tons.

I would like to submit this for the record. [Exhibit 6]

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64 By Mr. Garcia-Mendez:

Q. Mr. Davis, is it or is it not a fact that the ports where Puerto Rico American Refineries are located are better port facilities than, Mayaguez, where Igualdad Western is located? A. From personal inspection I can not answer either yes or no. It is my understanding that the facilities at Ponce, as it refers to the Puerto Rican American Refinery, are very good. I can not speak for Mayaguez.

Q. Do you think that it would be a fair and equitable flow of sugar that some sugar refiners under the proposed formula to have to ship their raw sugar to continental United States while others would have to go to other points —distant points—in Puerto Rico to get raw sugar to refine in their refineries? A. Would you repeat that statement again, sir?

Q. Do you think that it is a fair and equitable flow of sugar, the fact that under the proposed formula, some of the sugar refiners will have to ship some of their raw sugar to continental United States, while Puerto Rican American will have to go to eastern points in Puerto Rico to buy raw sugar to refine? A. I think, sir, your question

65 is irrelevant to the proposal submitted herein and

for the allocation of the direct consumption of quotas for distribution in the United States. That is a matter of internal—that is your internal problem there.

Q. Still, don't you think that it is contrary to an equitable flow? A. Not necessarily.

Q. Why? A. It is a question of price probably. Isn't that something that they can decide among themselves in their fiscal policy as to what they wanted to do and what they do not want to do?

Q. Would it not affect the fair flow of the sugar? A. I don't believe it would.

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By Mr. Bagwell:

Q. Mr. Davis, you have presented here today a proposed method of allotment. Would you state for the record whether this proposal was worked out by yourself or whether it was worked out by you in conjunction with other officials in the Department. A. It was worked out by me in conjunction with other officials of the Sugar Branch in the Department of Agriculture.

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Q. Did those officials include the director of the Sugar Branch and the Administrator of the Production and Marketing Administration? A. It included the Director of the Sugar Branch.

Q. And also the Director of the Production and Marketing Administration. A. Yes, sir.

Q. In measuring ability to market, you have testified that you took into account both refining capacity and shipments to the continental United States during specified years.

Did you consider any other factors which might be used as a measure of ability? A. In which years?

Q. In this particular proposal here. A. Would you mind repeating that question again, sir?

Q. I understood you to testify this morning that it was possible to measure ability to market in one of two ways:

either by taking the refining capacity of the plant or else by taking actual performance as indicated by the shipments of sugar to the continental United States. I was
67 asking whether any other basis was considered by the Department than those two? A. No.

Q. Do you consider actual performance or shipments during a particular period of time as a better indication of ability to market than mere refining capacity of the mill? A. As previously stated in my presentation, the Department feels that the marketings over a representative number of years—in this case, the 13 years—is more representative than the actual physical mill capacity.

Q. In measuring ability I noticed that you took the best year of performance during the period 1935 to 1947 inclusive, is that correct? A. That is correct.

Q. This period covered both peacetime and wartime years. Would you say that the shipments of an individual company during the war years, despite war dislocations and so on which you discussed this morning, would be an indication of ability to market for that particular company? A. I think it would.

Q. Do you feel that the fact that a particular company did not market as much sugar, or ship as much sugar, to the continental United States during the war years as it did during the pre-war period, might indicate that war years was not a good indication of the ability of that company to ship sugar? A. In particular instances, it
68 may have been an indication of their inability to ship as much sugar as they may have previously. On the contrary, some companies may have, during the war years, shipped and entered into the United States more sugar than they did in the prewar period, and it is the Department's feeling that if they have shown that ability, that it should be counted in determining their ability to market. Therefore, we have taken from the year 1935 through 1947.

Q. You had before you, when you did this, the present refining capacity of the various mills? A. Yes.

Q. Did you find, in going over those figures, that there had been any change in the refining capacity, although there may have been a substantial change in actual marketings, comparing prewar and war years? A. There was some change in 1947, as compared to 1939, when considered on the same comparable basis of taking five consecutive days run out of the best ten during the period '39 or '47, and the Puerto Rican American Sugar Refinery, in 1939, was 207,195. In 1947 it was considered to be 196,920 tons.

Q. Now, assuming—

The Witness: Excuse me, sir. I might as well get those in. At Aguirre 1939, 13,765; 1947, 30,350. Central
69 Guanica, 34,956 in '39; 1947, 52,896. Central Igualdad, 66,396 in '39, 68,367 in 1947. Central Roig, 60,201 in 1939, 110,556 in 1947. Central San Francisco 3,176 in 1939, 3,201 in 1947. Central Camuy in 1947 was rated 22,692 and we have no figure whatsoever on that company in 1947.

* * * * * * * * * *

Q. Assuming, as I understand was a fact, that individual companies—that the refining capacities of individual companies had not materially changed over the years. The fact that there was a substantial reduction in shipments during the war period would indicate to you, would it, that the war years would not be a fair indication of the ability of that company to market sugar. A. That is correct. The dislocations during the war period and dislocations that were necessary for the furtherance of the war, including the import and export controls, price controls, shipping controls particularly with regard to allocation of shipping to ports and the quantity of sugar that could be brought up, the differentiation of the tripartite agreement between Canada, the United Kingdom and the United States, making a reallocation to where it would do the most good for the war effort, whether it would be refined or
70 whether it would be in raw sugar, the zoning restrictions in the United States, the actual CCC purchase

of the crop for further distribution; all had a bearing on dislocations within the Island as to their ability to market and, are considered to be completely unrepresentative.

Q. You have indicated a number of war time dislocations resulting from the various government restrictions and government programs that were carried on during the war. Could you state, if you know, when price control over sugar, for example, ended? A. October 31, 1947.

Q. And sugar was rationing as late as what date? A. Consumer rationing I believe went off sometime in May or June and industrial rationing July 28, I believe.

Q. What year? A. 1947.

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71 Q. You indicated this morning that Title II of the Sugar Act under which sugar quotas are imposed has been suspended by Presidential Proclamation. Do you know when that suspension took place? A. The last suspension took place on April 13, 1942 and was reimposed on November 28, 1947.

Q. And during that time, according to the finding made in the Proclamation there was an emergency with respect to sugar? A. That is correct.

Q. Would you say that during all of this period of wartime government regulations and restrictions, involving the various controls which you have mentioned, and which I shall not repeat, would change the competitive position of the parties that are interested in this hearing? A. Yes, sir.

Q. Does the Department have any policy which you could state for the record, with respect to making allotments in a way that would not perpetuate this wartime pattern of competition between the companies? A. As I mentioned on page 6 of my statement this morning, the wartime years were all so considered undesirable because of the wartime policy of the Department to minimize interference with the prewar competitive relationships of industry.

72 Q. You indicated in your testimony today—or rather, you repeated—the basic standard which the

statute requires the Secretary to use in arriving at these allotments, namely that allotments shall be made in a manner that will give a fair, efficient, and equitable distribution of the quota. Would you say in arriving at this proposal, that it is the judgment of the Department that the use of the standards of the Act in the manner in which they have been used in this proposal, would give a fair, efficient, and equitable distribution? A. I do.

Q. Would you say that it might be possible also to work out proposals which would achieve some fair result, and that the Department would be glad to give full and careful consideration to these proposals if presented for this hearing? A. The proposal as presented by the government is what we consider to be a fair, efficient, and equitable distribution of the quota, all things being taken into consideration. The order also stated that—I might say the order didn't say that, but while we were required to put in our proposal, the order also stated that the Secretary was calling this hearing for the purpose of receiving all the evidence possible to make a fair, efficient, and equitable decision, and if anybody has any other proposal I am quite sure that the Presiding Officer and the Secretary will give full consideration to any other proposals.

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73 By Mr. Lee:

Q. Mr. Davis, you enumerated a number of dislocations—in fact a rather lengthy number of dislocations—that in your opinion made unrepresentative the war years for the purposes of ascertaining past marketings. Would those same dislocations make the postwar years unrepresentative for the purpose of ascertaining ability to market? A. I believe I answer that before, Mr. Lee, in answering the question, that, while the Department does consider that the past marketings in the years 1935 to 1941, as representing the equitable use of the figures for past marketings, if in spite of all the dislocations and other factors during the war, some refiner has marketed more during the war years,

when measured as his ability to market, than he may have in the pre-war years, it is considered that it should be taken as their ability to market their highest year.

Q. The war years are representative for that purpose? A. Yes, sir.

74 Q. Mr. Davis, I was confused by your answer to one of Mr. Bagwell's earlier questions. As I understood it, you testified this morning that the highest marketings for the years '35 to '47 have been selected instead of physical plant capacity, as a basis for determining ability to market. A. I think Mr. Bagwell's question was:

In the study of the different proposals and in working over every conceivable formula that we could use, had we taken into consideration at any time mill capacity. * * * A. And I said that in our study we have taken in not only mill capacity but many other formulas. And we came up with this one as the one which we considered the most fair, efficient, and equitable. In the light of the statement that I just previously read, the wartime years are also considered undesirable because of the wartime policy of the Department to minimize interference with the prewar competitive relationships of industries.

Q. You did not use plant capacity however as a basis for determining market under the present proposal? A. Under this proposal, I did not, sir.

Q. Mr. Davis, you stated that in your judgment, various governmental controls during the war period changed the competitive positions of the various refiners, so that

75 those competitive positions I presume become dislocated from what you regard as normal.

Do you have any facts on which you base the conclusions that those war controls operated in such a fashion as to dislocate the competitive positions? * * * A. Your question is rather difficult, Mr. Lee, but I think it might be answered in this manner: That competitive relationships between maybe any particular company in relation to another I do not know, but in the over-all picture of the war period and the postwar period up to date, the figures as presented in

exhibit A clearly demonstrate in comparison with the competitive positions as they were in 1937, 1938, and 1939 and 1941, to be completely out of line.

* * * * * * * * * * *

Q. Those figures I take it you would agree do not necessarily demonstrate that the differences to which you refer were attributed to wartime controls. My question was whether or not you had any facts on which you based your conclusions that the wartime controls resulted in dislocations of the competitive position of the refineries,
76 whether you had any facts on which you based that conclusion. A. No facts other than the figures already presented.

Q. Mr. Davis, just one more question. You testified that the proposal submitted was, in your judgment, equitable. Do you adhere to that conclusion when one of the results of the proposal is that the Puerto Rican American allotment is very greatly increased over any that it had over the marketings involved in the last 7 years, while that of Igualdad is greatly decreased over most of its marketings in recent years? A. I do.

By Mr. Quinn:

Q. Mr. Davis, would you say that where the control of all sugar produced in Puerto Rico was in the control of the Commodity Credit Corporation during the war years, that the competitive positions of the different refineries was not within their control? A. Within the control of the refiners?

Q. Yes. A. The allotments, except in 1947, were not made, as I understand it, to the individual refiners.

Q. Could a refiner go out and purchase as much
77 sugar as he wanted to? A. Not as much as he wanted to.

Q. If a refiner in Puerto Rico was in the habit, or had a history of buying raw sugar for its refinery, from six or seven other raw mills located in owner's property, could that refiner go out and purchase those raw sugars— A. No.

Q. —in a free market? A. No.

Q. Isn't it a fact that Commodity Credit regulated the flow of the raw sugar available in Puerto Rico to the different refineries? A. Not to the different refineries as I understand it. The quantity of sugar that Commodity Credit Corporation, during the wartime, considered necessary to be made into refined sugar, was allotted to the raw sugar producers who in turn transferred it or sold it to the refiners to be processed into refined sugar and shipped to the United States.

Q. But it is a fact, is it not, that the Commodity Credit Corporation incorporated in its contracts a clause to the effect that it could determine the amount of raw sugar that could flow to any specific refinery in Puerto Rico? A. It is my understanding that the 1944 purchase contract for Puerto Rican Raw Sugar in Article II stated that upon the seller's application there will be released to seller for sale to Puerto Rican refiners, for refining, such quanti-
78 ties of raw sugar as the Commodity may approve. I may go further in amplifying that question, with the further statement that when the Commodity Credit Corporation purchased the entire Cuban crops during the same corresponding years, it is my understanding that there was an article in that contract which stated that no more than 375,000 short tons of refined sugar would be shipped by Cuba to the United States. And in making the Puerto Rican contracts it was the policy of the Department in administering those contracts, when and if it became necessary, to see that the same amount—corresponding amount—for Puerto Rico in the old 1937 sugar orders between Cuba and Puerto Rico was not exceeded to any large extent, because the war situation was such, and the reallocations of the enormous quantities of sugar had to be fluid, and in some instances they much preferred to have raw sugar for disposal rather than refined sugar.

Q. Well, that clause you just read, Mr. Davis—wasn't a similar clause included in all Commodity purchase contracts for the Puerto Rican crops, or a somewhat similar clause? A. A somewhat similar clause, yes.

Q. And Commodity Credit Corporation purchased the Puerto Rican crops from 1944 to 1947, inclusive, is that correct? A. I believe that is correct, sir.

Q. And prior to that, the Defense Supplies Cor-
79 poration purchased the unshipped amount of the 1943 crop, is that correct? A. Or the '42 crop?

Q. '42 crop. A. '42 crop, yes, sir.

Q. Mr. Davis, let me ask you this question: If a refiner in Puerto Rico was subject to a wartime control on shipping whereby all shipping out of the Caribbean area, including every island in the Caribbean area down to the northern coast of South America, was regarded as an area subject to one shipping pool, would you say, if that be a fact, that the competitive position of a refinery in Puerto Rico could be disturbed during the war years? A. It could have, depending upon the determination of the proper authorities as to what sugar they were going to bring up or what sugar they were not going to be allowed to ship on any particular vessel.

Q. Would your answer be the same if the authority to ship sugar was entirely in the hands of a government agency here that regarded the whole Caribbean area as a pool to which they would allot ships to move products from that whole region?

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80 Q. The question might be a duplication in the sentence but what I was driving at was: If the determination of what sugar was to be moved out of Puerto Rico rested in Washington rather than normally in Puerto Rico, would your answer be the same? A. I think it would

By Mr. Lee:

Q. May I ask this:

Do you know, Mr. Davis, whether the Commodity Credit Corporation under the clause that you read and similar clauses, ever refused an application of Puerto Rican American to release raw sugar for refining? A. I have no knowledge, sir.

Q. Do you know whether they ever refused any refiner? A. I have no knowledge.

By Mr. Quinn:

Q. Mr. Davis, are you familiar with the 1947 picture as regards direct consumption sugar? A. Somewhat.

Q. Do you recall CC letter No. 41? A. I do not.

81 Q. Do you have any knowledge as to whether or not the Department of Agriculture forced Puerto Rican American to ship raw sugar instead of refined? A. I have no knowledge of that.

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84 Mr. Davis: Mr. Presiding Officer, may I interject for a moment. Here are the figures that were requested. I believe I have them now. Exhibit 21 from the hearings on revision of sugar order No. 10 allotment of 1938 Puerto Rican sugar quota and allotment of local consumption quota held May 4, 1938 shows the delivery of sugar to local consumption by Puerto Rican processors during the year 1935, and includes raw sugar.

The other table is from the same exhibit and also includes raw sugar deliveries for local consumption for the year 1936. [Exhibits 7 and 8]

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90 **James M. Giles** was called as a witness, having
91 first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Quinn:

Q. Mr. Giles, you have given your full name? A. James M. Giles, Manager, Puerto Rican American Sugar Refinery Incorporated.

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Q. Will you please state how long you have been working for the owners of the Puerto Rican American Sugar Re-

finery? A. Since mid summer, 1919—June, I think was the month.

Q. Were you there when the—when was the Puerto Rican American Sugar Refinery constructed? A. Construction was mostly in 1925, first refining in 1926.

Q. Did you market any refined sugar in the continental market in 1926? A. Some. Five or six thousand tons.

Q. When your refinery was built, was it the first refinery in Puerto Rico? A. Strictly speaking, yes. That is,
92 the first refinery that melted raw sugar and treated it with carbon in a liquid state and boiled white sugar.

Q. When Puerto Rican American was built did you really bring a new industry to Puerto Rico? A. Yes, we did.

Q. What makes you say that? A. We applied to the insular government for tax exemption in accordance with the law for a period and obtained that exemption as a new industry.

Q. When the Puerto Rican American was built, Mr. Giles, in 1926, what market did it have in mind? A. Mostly the market in the continent. At that time, consumption of refined sugar in Puerto Rico was not very large.

Q. Would you hazard a guess at what the consumption of refined sugar in Puerto Rico was at that time? A. Not over 10,000 tons. I think it was less.

Q. You testified you made and shipped refined sugar in 1926? A. Yes.

Q. Did you continue to make and ship to the continental market refined sugar for 1927, '28 and '29? A. Yes, and on up to the present day.

Q. Did you continue to make and ship refined sugar for 1931, '32, '33 and '34? A. Yes.

93 Q. Do you recall the figure that the Puerto Rican American Sugar Refinery reached in the way of shipments to the continental market in 1933? A. Something over 100,000 tons. I don't recall the exact figure—'35, was the first year there—I think it was 102,000 tons if I am not mistaken.

Q. How does the refinery operate? Will you describe it in a general way for the record? A. The refinery is located along side Central "Mercedita" which makes raw sugar. It takes the raw sugar from Central "Mercedita" and anywhere from 5, 6 up to 10 or 11 raw sugar mills, melts that sugar, refines it, bags it, stores it for a while at times, ships it eventually to the continent when it is not sold locally.

Q. You mentioned that it takes sugar from 5 or 6 or 8 or 10, I believe you said, other raw mills? A. Yes. In different years the number varies.

Q. Are some of these mills located very close to the refinery? A. Some of them within five or 10 miles. Others a longer distance.

Q. Is there some sugar produced close to the refinery? A. As I stated, Central "Mercedita" produces sugar right along side the refinery.

Q. Does Central Mercedita produce enough sugar
94 to take care of the needs of the refinery? A. No.

Q. Does Central Mercedita produce enough sugar to care for the needs of the refinery as regards its continental market alone? A. This year, if all Mercedita sugar had been shipped to the continent it would have covered the continental allotment, with a slight average.

Q. But as a general rule, does Mercedita raise enough sugar cane to produce enough sugar to care for the needs of the refineries? A. Not previous to this year.

Q. Is the operation of the refinery tied in with the raw house, or is it an independent operation? A. The operation is independent. That is, it buys the raw sugar, but there are interchanges.

Q. I mean, the physical operation of the raw house, the act of manufacturing. A. The manufacturing is strictly the refinery.

Q. Does it operate on a five day week or how? A. Seven day week.

Q. Is it a 24 hour operation? A. 24 hour operation except when there is some breakdown or some interruption that is unavoidable.

Q. In other words, a continuous operation once the
95 crop starts coming in. A. Continuous with only one stop for the whole week, sometimes a four or five days stop, that is, continuous, except maybe some breakdowns or strikes which have also stopped it a few times.

Q. What does the refinery use for fuel? A. Part of the steam used is from the gas from the raw house. That is supplemented by using fuel oil.

Q. Would you say that fuel oil was essential for the operation of the refinery as far as fuel needs were concerned? A. Yes, it is.

Q. Are all the records of the refinery under your custody and control? A. Yes.

Q. Did you examine the figures of those records before you left Puerto Rico to come up here to testify? A. I did.

Q. Did you examine the figures as they appear in the Federal Register of December 6, page 8211? A. I have examined them, yes.

Q. Do those figures substantially agree with the figures of the refinery records? A. I have no changes to suggest except as was already mentioned here this morning a slight transference, misprint, in two different years.

96 The statement was given, total 162,000: it was 126,000. The 2 and 6 were transposed, and in the last year, '47, the hundreds were transposed. In one, it is 543 and in the other it is 453. Those two transposals are the only suggestions I have about correcting the record.

Q. Has the refinery ever used any raw sugar from the raw mills located on the north coast of Puerto Rico? A. Yes.

Q. Would you care to name those mills? A. From Central Cambalacke, I think several—

Q. You stated that the refinery took raw sugar from raw mills located near the refinery? A. Yes.

Q. Or fairly close to the refinery? A. The nearest one up to last year was Central Bocachica, the next nearest was Central Constancia, the next nearest was Central Cortada. After that, I am not quite sure about the distances, but

Central Armenian, Central Pellejas, Central San Francisco, Central Arreco, and in one or two years we bought sugar from Central Lafayette. Also from main Central Aguirre itself, and Cortada which I have already mentioned is one of the Aguirre mills and we got sugar from their mill at Machette, and when Central Caribbe was operating, we took all of their sugar.

97 Q. Have you been taking the raw sugar from these mills for a short time or a long time? A. Quite a number of years.

Q. Will you state the method of dealing with these raw mills? A. Prior to the emergency period we bought the sugar, entered into the contracts with different mills to buy sugar which in some cases we took it from the mill, in other cases it was delivered at the refinery

In others, we took it at the mill. We took delivery at the mill which furnished the sugar.

Q. Do these mills, some of these small mills near the refinery, have storage facilities? A. Very little.

Q. Would you say that you take their sugar as they make it? A. In one case, the storage facility just for what they produce overnight. Next morning, they want us to take the sugar away and if you don't do it pretty quick they begin to complain that they are full of sugar and can't move.

Q. How do you get that sugar to your refinery? A. By trucks.

Q. Mr. Giles, you stated that you made and shipped white sugar, refined sugar, to the continental market in 1926? A. Yes.

98 Q. Has Puerto Rican American shipped refined sugar for every year since then? A. Every year since 1926.

Q. In other words, you have a historical record of 22 years in operation as a manufacturer and marketer of refined sugar in continental United States? A. That is correct.

Q. Do you know of any other refineries in Puerto Rico that are dependent upon a source of supply of raw sugar from mills located other than on their own property? A. I don't know the details of the business dealings of the other refineries, but I do know that their total shipments are very close to their own production. It may be that they ship some of their own sugar and buy from some other mill. That, I don't know.

Q. Do you know of any other refinery that takes raw sugar from so many raw mills as you do in Puerto Rico? A. I do not.

Q. I believe you stated the refinery could operate independently of the raw house. A. It can.

Q. And does it? A. At times it has. That is, I understand you to mean that it can operate when the raw house is not operating.

Q. Do you know of any other refinery in Puerto
99 Rico that operates that way? A. That is another detail that I couldn't be sure about but my impression is that none of them do.

Q. What is the longest period of time the refinery is operated over a given year. Has it been ten months or is it operated for a full 12 months or not? A. Never for a full 12 months, but several years during ten months.

Q. Mr. Giles, in order to get this raw sugar from your suppliers, has that ever interfered with the raw production on your own property? A. Somewhat at times.

Q. Will you explain how? A. That was during the emergency period when shipping space was not available in sufficient amount and warehouses were full, and I remember on one occasion we shut down our own mill and took sugar from another Central because we didn't have enough room to store our own. The other Central produced a smaller amount which we couldn't take care of.

Q. In other words, because it was customary for you to take that sugar, rather than sacrifice that source of supply for that year or any future year, you lessened the production of your own raw supply? A. Yes. We had established

the custom of taking the sugar from these mills practically as they produced it and in order to maintain cordial
99-A relations, we had to more or less keep on taking the sugar that was as much so as we could.

Q. Mr. Giles, do you recall when the first restrictive act, known as the Jones Costigan Act was considered and passed by Congress? A. It was in 1934.

Q. Do you recall the formula that was used in that Act by Congress? A. Not distinctly, no.

Q. Do you recall what years that the Jones Costigan Act selected as a criterion for future shipments of direct consumption from Puerto Rico to the continental United States? A. I am sorry, I am not sure. There were also some questions of production quotas for raw sugar about that time and my impression is that the years '31, '32 and '34 were used, but I may be off one or two years on some of that.

Q. Do you recall whether the Congress stated in the law that it took an average of those years, or the highest of those years? A. I think there was an alternative proposal. I don't remember the details of the formula, but I think it was either the average or the best year, which ever was finally determined. I am not quite sure how they worked it out.

Q. Do you recall anything in Puerto Rico in 1932 that affected the production of sugar? A. I think that was about the time that NRA began to function, or
100 shortly after that.

Q. The NRA was 1933 or '34 but going back to prior to sugar legislation, do you recall any physical condition in the production of the crop in that year, anything that happened to lessen the supply of sugar? A. In '32?

Q. Or in '31? A. So many things have happened at different times.

Q. Was there a hurricane in Puerto Rico that year? A. Not to affect—let's see. '28 was the last hurricane that hit the south coast.

Q. Wasn't there a hurricane in Puerto Rico in 1932? A. There was but it didn't affect the south coast very much. That was mostly the northeast of Puerto Rico.

Q. Mr. Giles, when the refinery was built and for several years thereafter, did you have any reason to believe that your manufacture and shipment of refined sugar to the mainland would be curtailed or lessened in any sense? A. No. Up to the time the first Sugar Act, the triple A Act, was passed, we did'nt have any intimation that we were going to be limited except by our capacity to refine and sell.

Q. Would you care to state what that capacity was approximately? A. By 1933, it was considerably over a hundred thousand tons of refined sugar.

101 Q. And by 1933, had you actually made and shipped in excess of 100,000 tons to the continental market alone? A. My recollection is that we did ship more than 100,000 tons in 1933 or '34, I am not sure just which year it was.

However, I might say that the Agricultural Department has the records of all those things.

Q. Mr. Giles, it has been testified to here that the first order [Exhibit 9] issued pursuant to the original Act was made in 1935. • • • Will you look at that Act Mr. Giles and state the amount of sugar that Puerto Rican American Sugar Refinery was allotted by the Department of Agriculture that year? A. "Pursuant to Section 1 of this order it is hereby allotted as follows: to Puerto Rican American Sugar Refining Company, 118,217 short tons, raw value."

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102 Q. Will you name all the other processors which were given an allotment pursuant to that order? A. South Puerto Rican Sugar Company of Puerto Rico, 12,312 short tons, raw value."

Q. Any other processor named? A. No more here.

Q. In other words, the only two companies that the Department recognized in that order of 1935, pursuant to the Jones Costigan Act were Puerto Rican American and South Puerto Rico. A. That is all.

Q. Did South Puerto Rico produce a refined sugar, as you know the prodr:t of Puerto Rican American to be? A. At one time there was a legal definition of refining in the State of Louisiana, in a case there, and it was defined as melting raw sugar, removing the color, while in the liquid state, and then crystalizing white sugar.

The South Puerto Rico Sugar Company at that time was not following that process.

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111 **J. Adalberto Roig** was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lee:

Q. Will you state your name and place of residence, and connection with the Central Roig Refining Company? A. My name is J. Adalberto Roig, and I reside in Humaco, Puerto Rico. I am Vice-President of Central Roig Refining Company.

Q. What is your profession? A. I am an engineer by profession, graduate of the Massachusetts Institute of Technology.

Q. How long have you been engaged in the business of producing and refining raw sugar? A. I have been engaged in the business of producing and marketing raw sugar since 1934.

Q. And refined sugar? A. Since 1936.

Q. Are you familiar with the problems in the production and marketing of both raw and refined sugar? A. Yes, sir.

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113 The Witness: During the period elapsed since the last contested hearing on this subject in the latter part of 1938, there have been substantial changes in the refining situation in Puerto Rico.

First, many of the Puerto Rican refineries have gradually increased their capacity over all or a portion of this period.

Second, the consumption of refined sugar locally in Puerto Rico has increased substantially with the result that many refineries have increased their marketings of local consumption sugar.

In some instances this has been accompanied by a decrease in their marketings of direct consumption sugar for the continental United States, while in other instances refineries have shown ability to increase both their marketings of direct consumption sugar for the continental United States and direct consumption sugar for Puerto Rico.

Third, some refineries during this period have extended their refining period by several weeks.

At the time that I testified in 1938 the Central Roig
114 Refining Company had a capacity of 200.67 short tons refined value of sugar for a 24-hour period, as measured by the best five consecutive days of a consecutive 10-day period.

Today the capacity of the Roig Refinery is greatly increased. At the same time, during this period, we have increased our marketings of direct consumption sugar from approximately 12,000 short tons raw value to over 27,000 short tons raw value for the continental United States and have increased our marketings of direct consumption sugar for local consumption in Puerto Rico from approximately 6,000 short tons raw value to 21,000 short tons, raw value.

All our direct consumption sugar is refined sugar. We do not market turbinado sugar or direct consumption raw sugar.

In its proposal the Government has given fifty percent weight to past marketings and for that purpose has selected an average of deliveries of Puerto Rican direct consumption sugar to the continental United States by each refiner for the years 1935 through 1941.

The facts as to marketing during such 6-year period fail to take account of the changes in marketing that occurred during the subsequent 6-year period of 1942 to 1947.

Past marketing starts with marketings in 1947 and includes marketings in 1946, 1945, 1944, 1943, and
115 1942, just as much as marketings in the six earlier years. Any selection of years for past marketing should start with the immediate past and continue back for a representative period.

From my knowledge of marketing of Puerto Rican direct consumption sugar for the continental United States, I am of the opinion that the last ten years, 1947 to 1938, inclusive, would be a representative period. Such a ten-year period would include years during which quotas were suspended, such as 1940, 1942, 1943, 1944, 1945, 1946, 1947, in several of which years there were no governmental restrictions on marketing.

It would also include years in which the refiners by agreement restricted their marketing, and years in which restrictions were imposed under wartime controls.

In still other years of this ten-year period there were quota controls imposed by the Secretary under the Sugar Act of 1937 without prior agreement among the refiners.

Further back than the ten years last past is not representative. In 1935 the Central Roig Refinery was not in existence and we had no deliveries, and Igualdad had no deliveries in 1935, 1936, and 1937, except small quantities of turbinado.

Skipping the years 1942 to 1947, and selection of the years 1935 to 1941 results in an unrepresentative pe-
116 riod as to past marketings and one which, I believe, the Secretary will conclude is discriminatory against Roig and Igualdad and preferential to their competitors.

Central Roig Refining Company increased its production throughout the war period, and its combined deliveries to the continental United States and to Puerto Rico were greater during that period than its combined deliveries during the preceding years.

The total production and combined deliveries of some other refiners were less during the war period than during the preceding years. These facts should add weight to the inclusion of the last seven years in any period that is truly representative of past marketings.

In its proposal the Government has given the remaining fifty percent weight to ability to market as measured by the highest one-year delivery of direct consumption sugar to the continental United States during any of the years 1935 to 1947, inclusive. Such a formula results in Aguirre and Igualdad having their ability to market determined by deliveries in 1947, while Puerto Rico American has its ability to market determined by deliveries in 1935, Cuanica by deliveries in 1939, and Roig by its deliveries in 1940.

Ability to market in any year is, in my opinion, best evidenced by deliveries for market in the immediately preceding year and the facts as to deliveries for market
117 eight, nine, and thirteen years ago are not an adequate basis for determining ability to market in 1948. I say this even though Roig had larger marketings in 1940 than 1947.

During the period since 1935 ability to market has been affected by changes in refining capacity. Ability to market direct consumption sugar to the continental United States has been altered in some instances over the last thirteen years by increase of local deliveries and consequent decrease of continental deliveries when refiner was unable to meet the maximum market available to it for both and chose for economic reasons to select the more highly profitable local market.

Ability to market sugar for the continental United States is not the same as ability to produce sugar. A mill may have a large ability to produce and less ability to market in the continental United States because of the fact that it does not have adequate proportionate shares of sugar of its own to refine and is unable, even in unrestricted years, to acquire sufficient other sugar to run its refinery to production capacity.

Ability to produce is also not a measure of ability to market in the continental United States. A refiner's limited production may as a result of his own policies be committed or allocated for local consumption in Puerto Rico with the result that he is less able to market in the continental United States.

118 It is my opinion that not only are marketings eight, nine, and thirteen years ago unrepresentative of present ability to market, but that a formula providing such a measure of ability to market is unrealistic and consequently will result in discrimination.

Should the Government's proposal be adopted in its present form, Puerto Rico American would receive an allotment far greater than deliveries during any of the last six years 1942 to 1947, and also more than its 1941 deliveries and San Francisco would receive more than its deliveries during any of the last five years.

On the other hand, Roig would receive far less than its deliveries for the last two years and also substantially less than its deliveries during five of the last six years, and Igualdad far less than its deliveries for any of the last three years and substantially less than any of its deliveries for the last six years.

I suggest for consideration by the Secretary of Agriculture a formula as follows:

1. That fifty percent weight be given to past marketings and fifty percent weight to ability to market, as provided in the Government's proposal.

2. That past marketings over an average period be used, as proposed by the government, but that such past
119 period be one that starts with the first part marketing year, 1947, and continues for a representative period, namely, ten years.

3. That ability to market be determined by deliveries during a single year, as set forth in the government's pro-

facilities and administration, ordered that the trucks carrying sugar to the pier must not use lights at night. An insular law provides that any motor vehicle must use lights at night, so we were up against a little difficulty there. Shipping was entirely inadequate. Many times, all through the latter part of the crop, our warehouses were full of sugar, we couldn't move it by ships, and we were up against a problem of whether or not we would shut down tomorrow or next day, or maybe around four or five days longer, and it was always an uneasy question whether or not we would get any transportation in time to relieve the situation. At one time, I recall we had one million bags of sugar in different warehouses—refined sugar—in different warehouses in and around Ponce and Playa, waiting for ship-
158 ment. Those were substantial difficulties.

Q. Mr. Giles, did the supply of sugar to the refinery suffer on account of bags in any way, to transport raws to the refinery? A. We had difficulty in getting bags in sufficient quantity because of the control of the sale of cotton goods. The bag makers couldn't always get the goods to make bags. They had to get in their applications—I think they made quarterly applications for allotment of supplies—and sometimes we were running so short on bags that it looked like we might have to shut down for lack of any bags to put the refined sugar in. It never did quite come to that point, but we were always up against the problem.

Q. Mr. Giles, did you have to alter your refining operations on account of black-outs? A. No. Not the refinery. When the first black-out order came, the only mill operating, from which we take sugar, was Central Bocachico. The first day we ground was the same day, I believe, that Pearl Harbor was attacked. The next day we were ordered by the Army to shut down and black out the factory that night. We explained to them the embarrassing situation that that would put us in and they allowed us to turn out most of the lights and run through the night, and then they

posal, but that such year be one representative of present ability to market, namely, 1947.

4. That, as provided in the government's proposal, there be an unallotted reserve to be reallotted to the extent that it is unused, but that such an unallotted reserve be based on the same period as that for past marketings, namely, the last ten years, 1947 to 1938, inclusive.

The above proposal is in line with the action taken by the Secretary of Agriculture when he last made allotments following a contested hearing in 1938.

In Puerto Rico Sugar Order No. 13, issued January 5, 1939, the Secretary measured past marketings by giving fifty percent weight to such marketings during the then four immediately past years, 1938, 1937, 1936, and 1935. There was no gap or skipping over to earlier years only as in the present proposal.

In that same order of the Secretary ability to market was measured by the then immediate past year, 1938, and not by turning in some instances to years long past.

In making use of one particular year for ability to market that order determined such ability, three-fourths by refined capacity during that year, and one-fourth by deliveries during that year.

However, the Department, in its present proposal, measures ability to market solely by deliveries, and my suggested formula follows the present proposal of the Department in this respect.

Mr. Presiding Officer, I believe the proposal I have made will provide for a fair, efficient, and equitable distribution of the Puerto Rican direct consumption quota for continental United States, and respectfully urge its adoption by the Secretary.

By Mr. Lee:

Q. Mr. Roig, your proposal, as you testified to it, included only the factors of past marketings and ability to market, while the law, as a result of recent amendments,

seems to state that the Secretary shall take into consideration not only those two factors, but the processing of sugar to which proportionate shares pertain. Is it your view that the factor of proportionate shares should not be considered by the Secretary? A. Mr. Lee, in presenting my suggested proposal, I am by no means suggesting that the Secretary shall ignore any factor that the law requires him to
121 consider. I confine my testimony to the facts as to past marketings, and ability to market on the assumption that the Secretary, by omitting in his present proposal the factor of processing of sugar, to which proportionate shares pertain, had already determined in accordance with findings of his predecessors, and even today, in earlier allotment orders, that such factors are inapplicable. However, if the law so requires it I am willing to accept that the Secretary add to my proposed formula a small weight based on proportionate shares which should be fair and equitable.

Q. Mr. Roig, suppose a refiner in Puerto Rico had insufficient sugar to supply the demand for both the increased consumption of refined sugar to Puerto Rico and the increased consumption or demand for direct consumption sugar to the United States, would that refiner have reason to increase his local consumption deliveries at the expense of his sales or deliveries of direct consumption sugar to the United States? A. I would say yes.

Q. What would be the reason? A. Because the local market for the last few years, especially during war years, has shown a better price than the export market. I mean the market in the continental United States, because of
122 the freight differential, and since no sugars could come from the continent of the United States to Puerto Rico, that differential favored the local price.

Q. That resulted in local price being higher? A. It resulted in the local price being higher than the equivalent export price.

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Cross-Examination

By Mr. Quinn:

Q. Mr. Roig, did refinery Roig experience any shipping difficulties during the years 1942 to 1946? A. I should say that the difficulty did not exist even though we are located fifty miles from the nearest port where we are shipping sugars. As a matter of fact, we are the only refinery in Puerto Rico that should have had difficulties, and such difficulties were not apparent.

Q. Am I to understand that Refinery Roig had no difficulty shipping its sugar to continental United States during the years 1942 to 1946? A. We had no difficulties of transportation and getting the boats everytime we
123 did request getting the space on the boats.

Q. Who did you have to make those requests on to get shipping space? A. From the shipping board agent in San Juan.

Q. In other words, you could not ship sugar as you made it? You had to apply for a permit to get the sugar out of the Island? A. That is right.

Q. Did you have any difficulty getting fertilizer for the production of your raw sugar to supply the refinery? A. In only one year we did not get what we do usually. Perhaps you are not acquainted with the fact that our properties are one of the properties in Puerto Rico that require the most fertilizer per acre. Therefore under a comparative basis for the rest of the Island, we were getting enough fertilizer.

Q. Did you have any difficulty getting bags during 1942 to 1946? A. No, sir.

Q. You had no difficulty whatsoever? A. No, sir.

Q. Did you have any difficulty due to strikes during 1942 to 1946? A. No, sir.

124 Q. You had no strikes whatsoever? A. We may have had strikes, but they were fixed up and we had no difficulty later on.

told us we would have to get small blue lights, and we
159 could use those provided they were not visible from a certain angle up in the air, and then we got blue paint and painted the globes we had—we couldn't get the blue glass for a good long while, but we painted the electric light bulbs and kept on in that way.

Q. Did you have any difficulty, Mr. Giles, in getting your product from the refinery to the dock due to gasoline shortage or anything? A. Yes. Gasoline shortage and the tire shortage, or the control or sale of tires, or the impossibility of getting tires for the trucks at times.

Q. Did your supply of raw sugar suffer by reason of lack of fertilizer on the part of your raw supplies? A. In several of the war years, it did suffer considerably.

Q. Did you have an experience whereby the shipping company refused to take refined sugar? A. Yes. On one occasion, we were told by the steamship agent, first, and then by the San Juan representative of the War Shipping Administration, that no more refined sugar—or no more space for shipping refined sugar—would be allotted until certain amounts of raw sugar had been shipped, so that we had to go on refining and storing sugar as long as we could find space to store it in.

Q. Mr. Giles, all during the war years, you were
160 refining more than your capacity; is that right? A. More than our capacity?

Q. Were you refining at your capacity during the war years—the raw capacity? A. I don't get that question right.

We were refining more raw sugar than Central Mercedita produced, if that is what you mean.

Q. The question is, Mr. Giles: Did you refine during the war years more raw sugar than was available on the properties where the refinery is located? A. Yes.

Q. Will you explain the difficulties that you experienced in refining, and whether those difficulties were common to all the refiners in Puerto Rico? A. I think I mentioned

Q. Your production at no time was materially interfered with during 1942 to 1946 by a strike? A. I believe that the records of our refinery show that, although throughout those periods we were able to increase production for both local and export markets which shows that no such difficulties were there.

Q. Was your refinery ever forced to shut down on account of a strike? A. It may have shut down for a short period, but of no consequence.

Q. Do you know whether it did shut down, or not? A. It may have shut down. I don't recall any specific period.

Q. Did you have any difficulty getting fuel? A. No, sir.

Q. You had no difficulty whatsoever? A. No, sir.

Q. Did you have any difficulty getting gasoline? A. No, sir.

Q. You had no difficulty whatsoever? A. No, sir.

125 Q. Did you have any difficulty getting materials from continental United States for your refinery? A. No, sir.

Q. Did you ever apply for a permit to the Department of Interior to get materials for your refinery? Did the occasion ever arise? A. That was customary in getting materials to ask for priorities, and you would be granted such priorities in time to get the equipment for your crop.

Q. Isn't it a fact that the Department of Interior had complete control over every ounce of material that was shipped to Puerto Rico? A. That is right.

Q. Did the occasion ever arise where you had to apply to the Department of Interior for a permit to get materials for your refinery? A. Probably we did. I don't recall the exact details of it.

Q. You don't recall filing for such a permit? A. As I say we may have applied for these permits, but I don't recall the exact details of it.

Q. Would you say, Mr. Roig, that your operations during '42 to '46 were normal or abnormal? A. They were normal under an expansion program.

Q. You would not consider them abnormal by virtue of the war period? A. No, sir; they were under an expansion program because we had the ability to sell openly and the ability to market during that normal year.

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Q. Were your manufacturing operations altered by virtue of blackouts during 1942 to 1946? A. No, sir; not to any extent, because of the fact that we were fixed up so that any blackouts would not affect us.

Q. Did the military in any way interfere with your operations between 1942 and 1946? A. Not that I recall.

Q. Were you forced to comply with military regulations that you couldn't operate at night at any time during '42 to '46? A. We were told what not to do and we complied with what we were told.

Q. So the military did interfere, or make some suggestions about your operations? A. I believe that was general throughout the Island.

Q. In fact, then you were governed by the actions of the military authorities as to your manufacturing difficulties between 1942 and 1946? A. That is right.

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127 I believe I said we had no difficulties.

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Q. Mr. Roig, you suggested, I think, in your proposed formula that the Department take 1947 as the year in determining ability to perform; is that correct? A. That is correct.

Q. Do you recall that any refinery was restricted in the amount of refined sugar it could market in 1947? A. I believe we all were.

128 Q. Do you recall whether Puerto Rico American was restricted? A. As I said, we were, all were, so that includes Puerto Rican American.

Q. Do you recall the date that the Department of Agriculture restricted your shipments? A. I don't recall the date.

Q. Do you know how much refined sugar you had shipped into the continental United States for the calendar year 1947 up to April 5, 1947? A. I can't recall the figure.

Q. Did you ever hear of CCC letter No. 41? A. Yes, sir.

Q. Do you know the facts surrounding the issuance of that letter? A. Not the facts. I read the letter.

Q. Do you know what prompted the issuance of that letter? A. No, sir.

Q. You have no knowledge of that? A. No, sir.

Q. You suggested in your formula that the Secretary give some weight to the proportionate share; is that correct? A. Yes, a small weight.

129 Q. Has the Secretary ever given any determination in any of the sugar orders issued, to that factor in the law? A. They have not. They have expressed themselves that they don't see any use of doing it.

Q. Is Refinery Roig entitled to proportionate shares under the 1948 Act? A. I would think so.

Q. Refinery Roig? A. It is an affiliate of the El Ejemplo Roig Mills.

Q. Has Refinery Roig ever been given any proportionate share? A. It has been given a proportionate share to the raw mill.

Q. I am talking about Refinery Roig now. Has Refinery Roig ever been given a proportionate share under any Federal law? A. The question is not quite clear. I would like to have you expand a little more on it, because, as far as I know, no refinery has been given an allotment on which proportionate shares have been taken into consideration, so that includes Central Roig.

Q. Would you say that any refinery in Puerto Rico is entitled to a proportionate share? A. I would think that under 1948 law it is mandatory.

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130 Q. Now, you have accepted allotments previously in which the proportionate share language was not included; is that correct? A. Yes, sir.

131 Q. Did you at any time protest to the Department of Agriculture because they did not include that factor in their determination? A. Not in the past.

Q. What made you change your mind to believe that it should be in the 1948 Act? A. Because I believe that the law is changed enough so that proportionate shares should be given some weight.

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136 Q. At the suggestion of your counsel certain figures were read into the record this morning concerning local marketing. A. Yes, sir.

137 Q. I jotted those figures down, and so far as Refinery Roig, the lowest year was 3,633 tons for 1939, and the highest year was 17,588 tons for 1946. A. May I look at my own figures?

Q. Surely. A. Mr. Quinn, do you refer to the local consumption?

Q. Local market? A. Local market?

Q. In 1939 I have 3,663 tons. A. That is right.

Q. In 1946 17,588? A. That is right.

Q. The latter figure is roughly four or five times what you marketed in 1939; is that correct? A. Yes, sir.

Q. Does an examination of those figures indicate to you that your marketings during the war years were disproportionate in any way? A. They were increased, but I can't recall that disproportion. That shows our ability to market under any circumstances.

Q. But you did market locally five times as much in 1946 as you did in 1939? A. Yes, sir; so that Puerto Rican

138 American went up from 9,256 to 30,350.

Q. That is approximately three times what they did; is that right? A. Three times nine is around 27, but it is an increase of 23,000.

Q. Well, it is a little over three times what they marketed in 1939? A. Yes, but I want to make my point that the increase is 23,000 against our increase of only 14,000.

Q. Is your refinery as large as Puerto Rican American Sugar Refinery? A. It is not. It is getting close to it.

Q. When did you build your refinery? A. In 1935.

Q. Was it completed in 1935? A. Our first crop was 1936.

Q. When did you first market in continental United States? A. I believe it was 1936. It was in 1936.

Q. There was a restriction on the statute books then at that time as to the amount of sugar that could be brought into the continental United States; is that right? A. I don't recall.

Q. You don't recall the 1934 Act? A. Well, I know there was an Act, but as to specific clauses in it, I don't
139 recall.

Q. You have no knowledge of the fact that Congress had, by the time you started construction of your refinery, limited the amount of refined sugar that could be shipped to continental United States; is that right?

You had no knowledge of that fact? A. Well, it is a number of years back, and I would rather not answer yes or no.

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141 Q. Do you produce enough sugar on your properties to take care of the needs of your refinery? A. Up to a certain extent, and may I qualify my statement? This present crop we had to purchase outside sugars in order to be able to increase our local market, so we purchased local quota raw sugars, carried them to our refinery and refined them for the local market, but our own raw production is enough to take care of our export requirements plus the additional local market requirements that we have at present.

Q. Mr. Roig, according to the report of the Department of Agriculture, December 5, 1947, it shows Ejemplo Roig as producing 48,649 tons; is that correct? A. May I see the figures?

Q. Surely. (Handing to the witness). A. That is correct.

Q. That is your raw production for this year up
142 to December 5? A. Yes, sir.

Q. Will you turn the page over and tell us how much the figures show that you marketed in continental United States. A. We have marketed, up to this date, 27,274 tons.

Q. Will you also read the figure, from that same document, that you marketed locally? A. 17,478.

Q. They total, as I figure it up, 44,752? A. I suppose so.

Q. Short tons? A. Yes, sir.

Q. In other words, you did produce enough raw sugar to take care of the marketings up to December 5, both locally and in the continental United States; is that correct? A. No, it is not correct.

Q. Why not? A. Because you know that under the present distribution of local quotas in many instances you had to buy quotas from other mills since you didn't have enough of your own, and in our particular case, we did buy raws from a few mills to build up our local quota and those raw sugars were transported to our refinery and refined for that purpose.

Q. Was that just exchange of quotas, or what? A.
143 No, sir. An actual purchase of raw sugar and actual transportation.

Q. Aren't the figures there on raw production actual production by Ejemplo Roig, Central Roig? A. They are actual production, yes, sir.

Q. How many thousand tons? A. 48,649.

Q. And you marketed locally into the continental United States 44,000 tons? A. That is right.

Q. And yet you say you did not raise enough sugar to take care of the needs of the refinery? A. We raised sugars to produce as much refined as we could, but we did not have enough local quota to build up our requirements. We had to purchase raw sugars—local raw sugars—equivalent to local quota for that purpose.

Q. Do you sell raw sugar in the continental United States? A. In that particular case, we did sell raw sugars because they could not be shipped as refined, since we are limited.

Q. Have you sold raw sugars in the continental United States in previous years? A. No, sir.

144 Q. Has it been the practice of Roig to ship raw sugar into the continental United States? A. Possibly we have made a few shipments when restricted years were such that our export quota plus our local quota was less than our combined raw production.

Q. What other mills does the refinery have to depend upon for a raw supply of sugar? A. What other mills?

Q. Yes. A. Or do you mean what other refinery?

Q. What other mills does the refinery depend upon for a source of raw sugar? A. Well, from neighboring mills.

Q. Will you name them, please? A. Eastern Sugar, Pasto Viejo mill, Victoria, Juanita.

Q. Did you take raw sugar from those mills for 1947? A. Yes, sir.

Q. For 1946? A. No, sir.

Q. For 1945? A. I don't think so.

Q. For 1944? A. I don't think so.

Q. Did you take raw sugar from any of those mills for any previous year than 1944? A. In years back we
145 have purchased sugars from LaFayette and Aguirre, but I don't recall on which specific year.

Q. Mr. Roig, as far as the Department of Agriculture is concerned, would you say that as the years progressed, since 1937, you participated for the first time, I think, by virtue of the sugar order issued in 1938; is that correct? A. You mean in export of refined sugar to the continental United States?

Q. Yes, sir. A. Even before that we did ship sugar.

Q. But for the first time that you were given a quantity of sugar pursuant to a hearing and action of the Department of Agriculture, '38 was the first year? A. I believe so.

Q. You were given permission to ship on two subsequent occasions—1939 and again in 1940-41—permission to ship pursuant to hearings? A. Yes, sir.

Q. Was the treatment that you received from the Department of Agriculture better in those subsequent years; namely, 1939 and 1941—or was it worse than you received in 1938? A. I believe we had a slight increase, because we could show better performance all around as to ability to perform and ability to market plant capacity and such requirements, that were brought forth in the hearings.

Q. In other words, at the hands of the Department
146 of Agriculture, you received more in 1939 than you were permitted to market in 1938 in continental United States? A. We did receive more because we produced figures to show that we were entitled to more.

Q. But you did receive more, pursuant— A. Yes, sir.

Q. And in 1941, you did receive, at the hands of the Department of Agriculture, pursuant to an order, permission to market more in 1941 than you were permitted to market in 1939; is that right? A. In 1941, we all got together and agreed on a quota.

Q. Was that figure higher than what the Department permitted you to ship in, in 1939? A. Yes, sir, because we all realized that we had the performance and accepted our proposed formula.

Q. In other words on each occasion that it has been necessary for you to come here and receive an allotment, the treatment you received from the Department of Agriculture has been better in each instance? A. I am not complaining on that.

Q. I am asking you the question: Has the treatment been better or has it been downward? A. It has been better, because we have the performance, and I believe that we are entitled to it.

147 By Mr. Antonsanti:

Q. Will you give us your raw production at El Ejemplo or Central Roig for the past five years—raw production at

El Ejemplo and Roig? A. I don't have those figures with me.

Q. You don't have them? A. No, sir.

Q. The combined production of those two mills which are affiliated with your refinery—wasn't the combined production of those mills, in every one of those mills—the past five years—adequate for you to fulfill any quota that was allotted to you when it was allotted, and, as a matter of fact, didn't your direct consumption deliveries in the United States come out of that raw production? A. Yes, sir.

Q. During the war years, Mr. Roig, you were not faced, I understand, with a transportation problem of raw sugar to your refinery from outlying mills, and if you were, please explain. A. Well, we were faced with the transportation problems of raw sugar because we did transport raw sugars from our Central Ejemplo to the refinery at Central Roig, which is 8 to 10 miles distant, but the transportation problems were also faced with and solved because of the fact that our shipping port had to be San Juan, 50 miles away from our refinery. Therefore, we had no bad trans-
148 portation problems for raw sugars, we had transportation problems for refined sugar and we were able to find a solution for them.

Q. Mr. Roig, my question—I will repeat it to you—was: Beyond your own capacity of your own two raw mills, did you have a transportation problem to bring raw sugar into your refinery from any other outlying mill not owned or operated by your enterprise? A. We had no problems—

Q. You had no problems? A. —in that connection—

Q. You had no other sugar; is that right? A. —because we didn't buy any other sugars.

Q. Exactly, and your purchases of sugar from other mills were confined to 1947; is that right? A. That is, this present crop.

Q. And that was in order for you to fill your local quota, not the direct consumption quota? A. That is right.

Q. You stated that you had no difficulty with Army regulations or military regulations, transportation at night, and so forth. Will you state for the record whether your refinery is near the seashore, or is it in the interior of the Island? A. Our refinery is located on a very flat valley open to the sea, open to the Port of Yabucao, and it is located
149 about two to three miles from the port. Therefore, it is, as is very evidently seen, we had to submit to all restrictions on black outs and similar restrictions, because our refinery can be very clearly seen from the ocean.

Q. Did you state, Mr. Roig, that when you purchased the quotas of other mills, there was an actual transfer of sugars? A. Yes.

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Q. You said that during the war period, you were in the process of expansion; is that correct? A. Yes, sir.

Q. Isn't it true that your expansion began way before the war period? A. We did begin before the war period, but we never stopped expanding.

150 Q. I see, but the fact does remain that in 1940, which I believe you will accept as prior to the war period, was your highest producing year; is that correct? A. It was not our highest producing year.

Q. Well, for the purpose of this hearing, and concerning direct consumption sugar, it was your largest direct consumption deliveries to the United States, was it not? A. Yes, but it was not our highest producing year, because if you had 28,000 tons exported plus 6,000 tons sold locally, we have a production of roughly 34 to 35 thousand tons against 48,000 this present year.

Q. But following your formula and the reasons you have proffered behind them, does it appear to you that the year 1946 is more indicative of your ability to produce and market than the year 1940? A. Very definitely.

Q. You think so? A. Yes, sir.

Q. Is the fact that you only produced and marketed 27,246 tons in 1947 indicative that you could not have pro-

duced and marketed more? A. On the contrary, if you look at the record for 1940, the entire Island shipped 174,000 tons. If we had been allowed to ship that much this year, we probably may have gone over 40 or 50 thousand tons.

Q. Was there any difficulty in marketing sugar in
151 the continental United States from 1942 to 1947? Did you ever hear of any difficulties? A. No. We did not have any.

Q. No difficulty? A. No.

Q. Have you ever heard of any one else having difficulty disposing of sugar during the war years? A. On the contrary, it was easy to sell sugar then.

Q. Right. Consequently, sugar was tight, as they say in the vernacular; is that right? A. Yes.

Q. And anybody who had sugar could get rid of it very easily? A. Under rationing control.

Q. Right; but nevertheless, you want the Department, or the Secretary, to consider those years as normal and representative years to demonstrate somebody's—or anybody's—ability to market? A. Definitely.

Q. You do? A. Because we were able to do it and other refiners were able to do it, I can't see why other refiners didn't or were not able to do it.

. . . . . .

152 By Mr. Peyton:

Q. Mr. Roig, I think I understood you to testify that you had no shipping difficulties during the war years; is that correct? A. I don't know what you call shipping difficulties—

Q. Did you say that? A. —but since we were able to ship all our production, I don't think we had shipping difficulties.

Q. You had no shipping difficulties during the war years? A. I say that since we were able to ship everything we produced, I don't say we had any difficulties.

Q. You said you had no difficulties. A. We had no difficulties.

Q. Did you ever complain to the War Shipping Administration of the ones you were having? A. Once in a while we had to complain because we didn't get the boat at the right time and things like that, but eventually you would and the sugars were shipped, maybe later in the year, or what not, but they were eventually shipped.

Q. You did not consider those difficulties? A. They are difficulties, but as far as the performance there, I wouldn't say that they were difficulties.

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154 **Gustavo Lobo, Jr.**, was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Quinn:

Q. Will you please state your full name? A. Gustavo Lobo, Jr., President of Olivarria & Company, Incorporated, New York.

Q. Do you market Snow White sugar, the product of Puerto Rican American Sugar Refinery? A. In the United States, we do.

Q. How long have you marketed that product? A. Since 1942.

Q. Have you ever had any difficulty marketing that product? A. Not at all.

Q. Could you market more than you receive from the Puerto Rican American Sugar Refinery? A. Yes, indeed.

Q. How much more could you market, if you were
155 allowed to or permitted to? A. During the past five years, I could have marketed any amount that they shipped up, and I would say next year 150 to 200 thousand tons would present no difficulty.

Q. How much could you have marketed this year, Mr. Lobo? A. This year, 100,000 tons.

Q. Do you recall how much you did market? A. Approximately 60,000.

Q. Have you had any complaints about the quality of the sugar? A. No.

Q. Have you heard from any of the people to whom you distribute your sugar, any comment about the sugar? A. They always comment that it is as good a sugar as is made in the United States.

Q. Do you feel that way about it? A. I do.

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156 **J. M. Giles** resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Quinn:

Q. Mr. Giles, focusing your attention on the years 1942 to 1946, did Puerto Rican American Sugar Refinery experience any difficulty in getting raw sugar? A. Lots of it.

Q. Will you state what those difficulties were? A. There was rationing of gasoline which was necessary to transport raw sugar from any mill except Mercedita, to the refinery. There was Defense Transportation Administration which regulated the use of trucks which hauled the sugar.

At one time, there was a regulation that trucks could only travel loaded both ways, and we never had any refined sugar to send back to the raw sugar mills, so we couldn't do anything along that line. We had difficulty in
157 getting fuel oil to supplement the steam supply from the gas. Fuel oil was rationed. We had to get a permit from the General Supply Administration to buy fuel oil, and then we had to get it transported by trucks. The same difficulty about rationing of gasoline. And then, when we got the sugar refined in bags in our warehouse at the refinery, we had to transport it to the pier at Ponce, the same difficulty there with the rationing of gasoline. One time I remember the Coast Guard which handled the port

that we had the difficulties of transporting raw sugar from other mills to the refinery, which difficulties consisted in the rationing of gasoline, the rationing of tires, and the regulations by the Defense Transportation Authority, all of which regulated and controlled and made more difficult the transportation of the sugar.

Q. What difficulties did the refinery experience that you believe other refineries did not experience? A. In that particular—the transportation of raw sugar from the producing mill to the refinery?

Q. Didn't they have that difficulty? A. They may
161 have had on a very small scale, but nothing like ours.

Q. In other words, they had a source of raw supply more available to the— A. They had mills that produced their raw sugar practically to their refining capacity, or their refining allotments.

Q. Did the refinery, Mr. Giles, have any storage difficulties? A. Yes, sir.

Q. Will you recite briefly what those difficulties were? A. Well, that was due to the lack of sufficient shipping space. The sugar had to be stored continuously and in large amounts. At one time, as I mentioned, we had over a million bags of sugar stored in and around the neighborhood of Ponce, before we could ship it.

Q. Did you try to get materials, Mr. Giles, to build any additional warehouse space? A. We made some effort, but nothing came of it.

Q. You did make an effort to get material? A. Yes.

Q. You were unsuccessful in getting those materials? A. Completely.

Q. Did you buy additional warehouse space during the war years? A. We bought one warehouse and rented several others.

Q. With this additional warehouse space that you
162 purchased, did you still have sufficient warehouse space? A. We still were very short on warehouse

space, and on one occasion, we had to shut down the refinery because we had nowhere to put refined sugar.

Q. Despite the fact that you bought this additional warehouse space, what occasioned the difficulty in storing your sugar? What was the root of it? A. Because of the—the principal cause was that we could not get the shipping space to move it out of Puerto Rico.

Q. Did you try, through your agent, your marketer up here, to get shipping space? A. We tried everyway we could think of—through our agent in New York and through the San Juan representative of the War Shipping Administration, and through the steamship agents in Ponce and San Juan who operated as representatives of the War Shipping Administration. They carried on the actual clerical work, the handling of bills and documents necessary.

Q. Isn't it a fact that for the 1944, '45, '46, and '47 crops, the amount of sugar you could draw, the amount was determined by the Department of Agriculture? A. For 1946?

Q. '44, '45, '46, and '47. A. '44, '45, '46 and '47 was determined by the Commodity Credit Corporation.

163 Q. Was the amount of sugar that you could sell locally also determined by the Commodity Credit Corporation for those years? A. The amount that each mill, each raw sugar producer, could transfer to Puerto Rican refineries was determined by the Commodity Credit Corporation.

Q. Did you ever have sugar left on the dock during the war years of 1942 to 1946? A. We had sugar left on the dock on one occasion by a steamer that was announced to load a certain amount. We began to put the sugar on the dock, the steamer came and started loading, and then the captain came and said he had orders to leave at a certain hour, and he left the sugar on the dock, and standing on trucks which we had to take some other place and unload.

Q. Do you know who gave the captain sailing orders? A. He said it was the Coast Guard officers. That is hearsay. I don't know who it was.

Q. Were you forced to ship sugar from any other port than Ponce? A. No.

Q. You had difficulty shipping sugar out of Ponce? A. These difficulties I have been mentioning concerned the shipping of sugar through the Port of Ponce.

164 Q. Do you know from your own knowledge whether there were other ports more accessible where shipping would go into Ponce during the war years? A. The movement of the ships was controlled by the—well, I never knew exactly—I think it was the War Shipping Administration, but sometimes they said it was the Navy Department, other times they put the blame on the Coast Guard, which I believe was part of the Navy Department at that time.

Q. Was it easier to move sugar out of San Juan than Ponce? A. I presume it was. We never shipped any sugar out of San Juan, but I think all of the steamers came into San Juan, and lots of them did not come to Ponce.

Q. Mr. Giles, when would you say that the refineries started to emerge from the effects of war due to the shipping shortage, the manufacturing supply shortages, and things of that nature? A. Well, it has been a very gradual process, and some of the difficulties still exist, but the situation was alleviated to some extent in 1946 and to a little further extent in 1947.

165 Q. Well, Mr. Giles, will you consult the Federal Register? How much sugar did you ship in 1947? A. 60,820 tons.

Q. Is that all the sugar that you wanted to ship in 1947? A. No.

Q. Why not? A. Well, before the allotments were promulgated, we had entered into contracts—that is, the refinery had contracted to buy—approximately 85,000 tons of sugar which we had assumed we would be able to ship to the continent.

Q. You had planned to ship 85,000 tons of sugar in 1947? A. Yes. That is not an exact figure, because the contracts

were for the production of the mill, and the mill production was estimated. The total of those estimates was around 85,000 tons.

Q. But you only shipped approximately 60,000? A. A little over 60,000.

Q. Will you explain the difference between those figures? What stopped you from shipping 85,000 tons? A. Well, sir, we were told by Commodity Credit that we would have to reduce our shipments, hold them down to the figures given by Commodity Credit, the 60,820 tons.

Q. Did the refinery protest that treatment, sir?

166 A. Absolutely.

Q. Did you instruct me to protest to the Department? A. Several times.

Mr. Quinn: At this point, Mr. Examiner, I want to offer in evidence a letter dated June 10, 1947, addressed to me, signed by James H. Marshall, Director of the Sugar Branch. I would like to read into the record parts of this letter. [Exhibit 10]

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168 Q. Mr. Giles, making reference to the letter which I just read, I want to ask you if that was your understanding of what the policy of the Department of Agriculture was in 1947, that resulting in your shipping only

169 60,000 tons, instead of 85,000 tons to the continental market? A. That was one of the communications that came through on the subject and the result was that we were limited to the shipment of the 60,000-odd tons.

Q. Mr. Giles, isn't it a fact that all of the white sugar we are talking about today that is permitted under the Act—isn't it an historical fact that the performance of Porto Rican American Sugar Refinery was responsible for that? A. When the limitations were first imposed, as shown in that first order, allotting Porto Rican American Refinery 118,000-odd, and Guanica Central some 5,000 and something, there was at that time an allowance made for some raw sugar used directly, without further processing,

and that formed the basis for the limit of 186,000, or 186,033 tons of direct consumption sugar that could be shipped from Puerto Rico to the United States.

Mr. Quinn: Mr. Examiner, at this time, I would like to ask you to take judicial notice of a report * * * en-
170 titled "Sugar and the Caribbean Problem for 1942-43-44." * * * from the office of the Anglo American Caribbean Commission, which is a branch of the Department of State. * * * This report bears No. 202 at
171 the top.

Presiding Officer Gifford: All right. The Secretary will take official notice of it.

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Mr. Quinn: This is a report to the President of the United States by the United States section of the Anglo-American Caribbean Commission.

The Governor of Puerto Rico was a member of this Commission.

On page marked VIII at the top of the page:

"Sugar and the Caribbean Problem for 1942-43-44.
172 "Summary and Recommendations:

1. Shipping tonnage available for imports of essential supplies in the Caribbean area barely meets the needs of subsistence. War Shipping Administration and the War Production Board predict a deterioration of increasing severity, due to pressure of higher priority cargoes on fewer available ships."

On page marked IX, still under "Summary and Recommendations," I will read item No. 11:

"11. Because these islands are dependent on a single shipping pool and for other reasons indicated in this study, it is important to treat the Caribbean sugar problem on a regional basis, bearing in mind, of course, the relations of the regional problems to the global war economy."

I shall continue with No. 12:

"12. The following action is recommended:

(a) Substantial reduction of 1943 and 1944 sugar crops

* * *

(e) Substantial increase in local food production. * * *
(g) Speed-up program for more use of small boats to assist in carrying essential supplies to the islands."

173 On page 1, it is noted that Governor Rexford Tugwell had the dual capacity of Governor of Puerto Rico and member of the Anglo American Caribbean Commission.

On page 3, under the heading "The Caribbean Area Considered as a Whole," subsection (c) reads as follows:

"Shipping now allocated to the Eastern Caribbean is insufficient to maintain the normally low standard of living without a substantial increase in local food production."

Then, under (d), there is the following:

"The amount of tonnage allocated to the Caribbean for shipments to the United States, with the exception of vessels engaged in the movement of bauxite, is based on the emergency situation rather than on north- or southbound requirements. The military requirement are met, food and general supplies, and petroleum are moved to Caribbean destinations, but these last in quantities which do not represent average normal requirements, nor in fact more than the minimum possible for short-term supply. Ships allocated to the Caribbean area on the present emergency basis, do not bring to the United States, Canada, or the United Kingdom on their return voyages more than a limited amount of the surplus sugar, coffee, or other
174 higher priority commodities available for export.

On page 4:

"In Puerto Rico, another area hard hit by the shipping shortage, the value of sugar exports accounts for 62 per cent of the total."

On page 8, under the subtitle "Caribbean Sugar Pool," there is the following:

"Reduction of the Caribbean Sugar crop as suggested above will in effect create a Caribbean sugar pool designed to operate with the utmost economy of ships."

On page 9, marked "c":

"The areas from which point requirements should be drawn and surpluses carried, taking into consideration—

1. The necessity of absolute minimum utilization of ocean-going ships, and

2. The steps that should be taken to alleviate the economic burdens which the shipping shortage will impose and also the necessary steps to be taken to level out the incidence of the program on the various sugar producing areas."

On page 17:

"Any estimate of the sugar movement in 1943 must be considered with the utmost caution, since the shipping services which will be maintained, ships which may be diverted from time to time, and, in fact, the whole transportation movement within the Caribbean area depends overwhelmingly on the most economical use of ships for the war program. There are commodities which have been given a higher priority rating than sugar; many tons of these have accumulated in various ports of the Caribbean for lack of shipping. These must be moved in preference to sugar. To mention a few of these commodities—there are cooper concentrates, chromites, sisal, henequin, balsawood, mahogany and bauxite, heavy shipments of which will be made from the Guianas."

On the bottom of page 22 and the top of page 23:

"Puerto Rico, because of its geographical position in the Eastern Caribbean has been allocated a reduction shipping service as an emergency measure. Therefor the outlook for the balance of 1942 and for 1943 is not one that justifies belief that a restoration of adequate tonnage is probable. The importance of sugar in the economy of Puerto Rico may be judged when it is noted that sugar exports in 1939-40 represented 62 per cent of the total."

On the bottom of page 23 and going to page 24: "During the forepart of March the accumulation of stocks would exceed total storage capacity. By July 1st, the increase in the stocks on the above basis, shipments as estimated being deducted, would have reached one

million tons, or 464,000 tons more than present storage space could accommodate.

Additional storage facilities in Puerto Rico must be considered in relation to available shipping since certain building material must be imported."

By Mr. Quinn:

Q. Mr. Giles, you have heard the quotations that I have read from this report. Do you agree in substance with what is stated therein? A. I agree that all of those difficulties were actual factual difficulties, and more besides, that are not mentioned there.

Q. By virtue of the one recommendation in that report, Mr. Giles, was there a food planting program in Puerto Rico? A. Yes, there was.

Q. Did you have to sacrifice cane land for the planting of food? A. One year we were required to plant 7½ per cent of cane acreage in so-called "food crops," that is small crops, beans, potatoes, or things of that sort; and the next year we were required to plant 20 per cent of the cane acreage in such crops.

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179 By Mr. Antonsanti:

Q. Mr. Giles, you heard Mr. Roig's testimony yesterday? A. Yes.

Q. Did you hear that part of his testimony where he stated that he had practically no difficulties during the war? A. I did.

Q. Will you state what difficulties your refinery—Puerto Rican American—had during the war, what dislocations, that were not common to other refineries? A. The principal difficulty not common to other refiners, or at least not to anything like the same extent, was in the transportation of raw sugar from the mills that produced it to the refiner.

Q. Did you hear Mr. Roig testify that most of his refined sugar was shipped through the port of San Juan?

180 A. Yes.

Q. How did shipments out of the port of San Juan compare during the war period with shipments out of the port of Ponce? A. Well, that was more or less a military secret, but from general information and our own experience on incoming freight, we know that all of the ships coming to Puerto Rico entered San Juan. I think that is without exception, the ships carrying freight.

Q. Do you recall that they had a convoy system? A. They did.

Q. That all military supplies entered San Juan first? A. Not only military but civilian supplies entered San Juan and were unloaded at San Juan when destined to the south coast of Puerto Rico.

Q. By water, what is the distance from San Juan to the point where you ship? A. By water, I don't know exactly, approximately 150 miles.

Q. You have to go completely around the island to reach your port, San Juan? A. Practically half the circumference. Either way, the distance doesn't vary much whether you go east or west of the island.

Q. Would you say that in volume shipments out of Ponce port compared with San Juan shipments of
181 sugar to the continent? A. Well, they compared, but vary small in comparison with the shipments from San Juan.

Q. They were proportionately much smaller? A. Very much smaller.

Q. How did your production in amount compare with that of Roig—how many bags did you produce a day, approximately? A. The figures on this statement show the comparison. Our production was from three to four times as much.

Q. Considering the availability of shipping space, would you say that a refiner who had 13 to 15 thousand bags a day production, would have more or less difficulty in shipping the same than a refiner who had 5, 4, or 3 thousand bags a day production? A. The handling the larger production,

I would say, increased in proportion, and somewhat more than direct proportion. That depends on the storage facilities—the shipping facilities.

Q. The larger amount of sugar you had on hand to ship the more difficulties you had, is that correct? A. More, much more.

Q. And that was very much in proportion between you and Roig and Igualdad, 15, 5 and 6? A. Something like that. Igualdad and Roig were more or less along the same production.

182 Q. If you purchased no outside sugars for refining at your plant, would you have less dislocations than if you had to purchase a great deal of sugar from outlying mills? A. Less, yes, because we would have had no problem transporting the raw sugar to the refinery.

Q. Were the same controls in effect in Puerto Rico that we knew here in the mainland insofar as Office of Defense Transportation, OPA, War Production Board, etcetera? A. To the best of my knowledge they were, and some, I think perhaps in addition, because we were in outlying territory dependent on marine transportation.

Q. All these federal war agencies had branches or regional offices in Puerto Rico, did they not? A. I think they did. A great many of them did, anyhow.

Q. You are familiar with OPA in Puerto Rico? A. Somewhat.

Q. With War Production Board? A. They were both there.

Q. With Office of Defense Transportation? A. Right.

Q. They all controlled to a great degree your gasoline supply, your tires, and the number of necessary trips that you could make, and the use of your trucks? A. All of those things were controlled, completely, you might say, by the governmental agencies because we had to get permits for everything.

183 Q. You stated that you in addition, confining the production to Central Mercedita, an affiliate of the

Puerto Rican American Refinery and Central Bocachica also an affiliate, also purchased sugar from outside mills? A. Yes.

. . . . . .

Q. Were these mills large or small in comparison with the general run of sugar mills from Puerto Rico? A. The larger number of them had small production.

Q. Small production? A. But we bought some sugar from mills that had large production. We didn't buy all of their output.

Q. Did those mills—the majority of them from whom you purchased sugar for refining—have adequate storage capacity? A. One of them—I am not sure, but I mentioned it yesterday—one of them had adequate storage capacity for the night's run and the next morning, if we didn't move the sugar early, they called on us to send trucks and get it out because they had no more room for backing sugar.

Q. Would you say that the production of 2 or 3
184 of the mills from whom you purchased outside sugar for refining was geared, so far as storage was concerned, to your refinery? A. I think there were two or perhaps three whose total production of export sugar we had bought over a period of years, and they expected us to take care of their movement of sugar as they made it.

Q. As they made it? A. Yes.

Q. Did they have adequate warehouses to store two or three days' supply of sugar? A. Very little, or none.

Q. Do you know whether the Roig Refinery purchased outside sugars during the war years? A. I don't know positively but the record indicates that it was not necessary for them to purchase outside sugar to secure their volume of output. Whether under some other circumstances they found it convenient to buy outside sugar and ship their own as raw, I don't know.

Q. Mr. Giles, from your experience in marketing in the continental United States direct consumption sugar during the war years, do you believe that you would have had

any difficulty in marketing one hundred or 150 thousand tons in the continental United States if you were able to produce and ship the same? A. I think if we had
185 been able to deliver that amount of sugar in the continent, it would have been grabbed up very quickly.

Q. No matter what the quality of the product might be? A. Well, the quality we maintained, I think pretty good, but I think it would have been taken anyhow.

Q. Would that lead you, Mr. Giles, to believe that the continental deliveries during the war are a safe criterion for ability to market? A. Absolutely not.

Q. Did you have to slow down or stop your refinery at any time during the war years, and if so, when and on what occasion? A. I can't recall all the occasions, but it quite directly occurred that the refinery production was held down practically all through the crop. That is, less than the physical capacity to produce sugar. We couldn't produce when we had no place to ship or store.

Q. And you do recall that you did that on more than one occasion? A. More than one. Several.

Q. Mr. Giles, did you attempt to do anything with the powers that were—

Presiding Officer Gifford: I presume you mean those having control of the regulations?

Mr. Antonsanti: Right.

186 Q. —to make available more shipping space to your firm? A. We did frequently, constantly, throughout the crop.

Q. Did you correspond with those persons? A. I didn't get that last.

Q. Did you correspond, did you exchange letters? A. Yes.

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189 Q. Mr. Giles, have you prepared any memorandum today in connection with the various dislocations that you had during the war in connection with the manufacture,

shipping, storage, etcetera, of your shipments? A. To refresh my memory, I went over certain memoranda that I had made personally and took out some references, just to remind myself of what had been happening over this period of years, a good many details that I wouldn't recall just off-hand.

190 Q. Will you please give us the highlights of those memoranda? A. This begins on December with a note to the effect that Central Bocachica, one of those Centrals whose total production—

Q. What year? A. '41.

—was contracted by the Puerto Rican American Sugar Refinery, began grinding for the '42 crop. On December 9—that is, the next day—the Army ordered a complete blackout of the Central from 9 p. m. to daylight, and as the grinding of cane is a continuous process, this placed a serious obstacle in our way. A few days later, we obtained permission to install small blue lights and continue grinding at night. Naturally, there were not enough blue lights obtainable in Puerto Rico to supply the light needed in the mill and we got permission to paint the globes of the lights we were using, and in a few days we got sufficient paint to paint them, in a way, and went on grinding. On December 20, Congress re-enacted the Sugar Act of 1937 for three years more. That is, December 30, 1941. That continued the same controls that we had been operating under prior to the war—prior to our entry in the war. On De-

191 cember 22nd, ceiling prices were proclaimed for sugar. $5.25 per hundred weight for cane refiners. On December 26, the President signed the bill which was passed a few days before continuing the 1937 sugar Act for three years, and on December 30, the President signed a trade agreement with Cuba, reducing the duty on Cuba to 75 cents per hundred weight. On January 2nd, sugar quotas were proclaimed for the 1942 crop—that is, production quotas and quotas for shipment to the United States too. Puerto Rico was limited to 959,088 tons.

Q. Raw? A. Raw sugar, raw basis, to be shipped to Puerto Rico. The production for that crop was 1,146,584 tons, total production of Puerto Rico. Then, on February 21, we sent a telegram to the Bull Line, protesting the contents of that same letter which has been withdrawn, in which the Bull Line notified us that we could only ship 15,000 bags of refined sugar per week. We called their attention to the fact that our production was 75 to 85 thousand bags per week and that we couldn't find warehouses to store the difference and it brought us up to the problem of how soon we would have to close down.

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192 Q. What was your production then? A. 15,000 per day.

Q. You were limited to 15,000 bags per week in shipping? A. Yes. On March 14, we sent a telegram to the Puerto Rican Commissioner of Agriculture, mentioning a report that we had heard that government transports would be made available for transporting sugar, and requesting that the officials, whoever had control of any such shipment, would give consideration to the fact that we had 400,000 bags of refined sugar ready for shipment on that date, and were already faced with shortage of warehouses, that we might have to close down the refinery and if we did that would involve the closing down of the raw sugar mills at Mercedita Bocachica, Herminia, Caribe and Constancia, whose sugar we were taking in the refinery. On March 18, we wrote a letter to the Commissioner of Agriculture confirming at telephone message and to the effect that we now had 445,000 bags of refined sugar and had been unable to make any shipments since March 4th—14 days in which we had made no shipment and had been obliged to notify Central's Caribe, Constancia and Herminia, that we couldn't take any more sugar from them until further notice. On

193 April 14th, we received notice that the provisions of Tital II of the Sugar Act, the quota provisions, had been suspended. On May 8, 1942, the Refinery was

shut down with a stock of 610,259 bags of refined sugar on hand—shut down because we didn't have any place to put any more and hadn't been able to get rid of it.

Q. Mr. Giles, in order not to unduly burden the record, could you state that this same factual situation and all these dislocations and difficulties continued on through all the war years and up to 1947? A. It did continue, sometimes more, sometimes less, depending on the stage of the crop. At the beginning of the crop of course, we usually had empty warehouses, but they filled up.

Q. And during all those periods, there was complete abnormality? A. Absolutely. We had no control of anything about the movement of sugar.

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194 Q. Mr. Giles, did you attempt to do anything concerning your lack of storage space during all this time, and if you did, what measures did you take? A. As I recall the situation it was a continual attempt to secure facilities of one kind or another, secure supplies, secure, for instance, bags for sugar.

When we got the bags filled with sugar, find a place to store them when we could not ship, which was chronically the case.

Q. Did you hire any storage space that you normally didn't use. A. I don't recall the number, but there were several warehouses rented which we normally did not use, and two or three of them were very unsuitable for storing sugar, but the best we could do.

Q. And you purchased other warehouses? A. We purchased one at least during that period.

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195 By Mr. Quinn:

Q. Mr. Giles, you were in direct personal charge of all shippings for the refinery? A. That is right.

Q. This was true of the period 1942 through 1946? A. That is right.

Q. How did your bills of lading read for the war years? A. Destination and American property. We never knew where the sugar was going.

Q. Were you instructed to make out your bills of lading that way? A. Yes, sir.

Q. Who instructed you to do that? A. I don't recall the individual. Most of the instructions like that came from the War Shipping Administration through the same organization in Ponce that had been handling the Bull Line and the New York Puerto Rico Line, and the Waterman, those same offices handled the business as agencies for the War Shipping Administration.

Q. Therefore you didn't know what happened to Puerto Rican American Sugar after it left Puerto Rico during those years? A. Not very definitely for some time.

196 Q. You didn't know then, when that sugar was shipped, whether it reached your normal trade channels or not? A. No, we did not.

Q. Was any Puerto Rican American sugar lost at sea by virtue of the submarine blockade? A. That was a military secret at the time. We were told by the local representative of the Bull Line that a certain shipment had not arrived at the port—at an American port. That was the language he used and I asked him if it was sunk at sea by a submarine and he said, "I can't tell you."

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By Mr. Lee:

Q. How far is the refinery—the Puerto Rican American —from the ocean? A. In a direct line, the nearest point from the shore?

Q. We will say, the route you usually take for the transportation of sugar. A. To the Ponce pier?

Q. Yes. A. About ten kilometers. I don't recall exactly.

Q. What is the storage capacity at the refinery?

197 A. At the refinery?

Q. Well, the storage capacity that you normally use for the storage of sugar of your ownership. A. Maximum capacity, 600,000 bags of refined sugar when there is nothing else to interfere, during the crop we had to have some space for handling raw sugar. We couldn't put both kind in the same space, and we had to have some space for movement. We couldn't fill the warehouse right up to the door and go on with the handling of either material in the current production.

Q. Were not ample supplies of gasoline made available through the appropriate government channels for transportation of essential food products, including sugar? I don't mean exactly the moment when you wanted them, but I mean ample to transport essential food products. A. Eventually, there were supplies of gasoline to transport what we could get of supplies, food products, and other things.

It was rather frequently the case that those supplies were not available at a convenient time and it involved waiting and worry.

Q. Mr. Giles, in 1947, what was the amount of the raw sugars to which proportionate shares pertained and
198 which you refined? A. You mean the proportionate shares for the production? There were no proportionate shares assigned during the year. "Proportionate share," is the expression used by the production and marketing administration, previously the triple A, assigning to each cane grower the amount of sugar that could be produced from cane grown by him. During these years of suspension of quotas that proportionate share was in the discarded, and all cane available could be ground.

Q. The growers received payments, did they not? A. The growers received payments after a while.

Q. They received payments on all they produced? A. Yes.

Q. Was not all they produced— A. That is, I presume they did. Those that ground cane at Mercedita received payments, I know.

Q. Was not all cane produced there proportionate shares, then? A. Yes.

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199 Q. How much did that sugar amount to that you refined in 1947? A. You mean how much of that sugar we refined in 1947?

Q. Now what was the quantity, how many tons did the sugar amount to that you refined in 1947? A. For shipment to the continental—

Q. No, for sugar—pardon me. A. The total amount?

Q. Not the amount of sugar that you shipped to the continent. What was the total amount of sugar that you refined to which those proportionate shares attached. A. All of the sugar we refined was produced under that condition.

Q. And how much was that? A. Could you—

Q. In tons. A. Your question is how many tons of raw sugar did we refine?

Q. That is stating it another way. Put it that way: How many tons of your own raw sugar were refined in 1947? A. Of our own raw sugar? You mean, the Puerto Rican American raw sugar?

200 Q. I am not trying to fence with you, Mr. Giles. Let me see if I can make it clear. A. I am trying to understand your question, frankly. I think there is some confusion about this matter of proportionate shares.

Q. There apparently is. I understood you to state a moment ago that all the sugar of producers had received payments, were entitled to payments, and that might be described as proportionate share sugar. Now, you have certain mills that were affiliated, and you refined certain sugar from those mills. How much of your refined sugar of Puerto Rican American is sugar that comes from growers who supply your raw mills and that can be described as proportionate share sugar? You have a total amount of refining. I want to know how much of that refining comes

from purchased sugars and how much of it comes from what might be called your own sugars. A. I see. Now, we can drop the matter of proportionate shares, because, as I stated, all of the sugar produced in Puerto Rico was subject to that provision of proportionate share.

Presiding Officer Gifford: That isn't the question. The question is how many tons from your own production and how many tons from other production.

The Witness: That is what I am trying to get
201 straight. A. Our own production for the year 1947 was 64,490 tons, I think, of raw sugar.

By Mr. Lee:

Q. How much of your refined sugar was that which you acquired by purchase from other than your own affiliates? A. As I stated yesterday, we had contracted—that is, the refinery—had contracted from raw sugar mills, including Mercedita, 85,000 tons more or less of raw sugar for shipment to the United States and 23,000 and something of local consumption sugar.

Q. Mr. Giles, I am not— A. Let me go a little further. I am here to tell the whole truth.

Q. Go ahead. A. When the Commodity Credit Limited our refinery shipments to the United States to 60,820 tons raw value, the refinery had in its possession, in warehouses along side the refinery, sugar from Central Pellejas, which we had to turn back to Central Pellejas, and we shipped it as raw sugar. There was also a small amount of sugar from Central Barbara, which we had to turn back to them and they shipped it as raw sugar, and then having reached the limit of the allowable shipments to the state, the refinery was shut down and Mercedita continued to grind cane and bag raw sugar which was shipped to the States in
202 the amount of 15,575 tons I think it was of raw sugar shipped by Central Mercedita to the States.

Q. Mr. Giles, let's try it again and see if we can get the information.

How much sugar did Puerto Rican American refine in 1947? A. How much sugar did Puerto Rican American refine?

Q. How much has it refined in 1947? A. 1,656,000 and I don't remember the hundreds exactly, bags of refined sugar were produced.

Q. Will you convert that to tons, please, short tons, refined value?

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A. The figures for 1947, in pounds raw value—do you want it in tons?

Q. The government's figures are in short tons refined value, are they not?

Mr. Davis: Short tons raw value.

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203 A. I can divide this number by 20 pretty easily. 62,446 tons of Mercedita shipments and 39,625 tons from outside—short tons, 2,000 pounds.

By Mr. Lee:

Q. Now, those two figures added together constitute the total amount of sugar that Puerto Rican American refined in 1947? A. Yes.

Q. Is the sugar that you referred to—is the Mercedita sugar the only raw sugar that was refined that was not acquired by purchase from non-affiliated mills? A. By non-affiliated mills, you wish to exclude Bocachica and Mercedita. Bocachica was not grinding—in 1947, so the 60-odd thousand tons is the sugar that was purchased by the refinery from raw sugar mills affiliated with the refinery.

Q. Would you state the corresponding figures for 1946? A. For 1946, in short tons, 2,000 pounds, from Central Mercedita and Bocachica combined, 57,114 tons, and from outside, 27,367 tons.

Q. And for 1945? A. For 1946 from Mercedita-Bocachica, 59,094 tons, and from outside, 24,206 tons.

Q. Mr. Giles, how far back do the figures that you
204 have before you run?

Mr. Quinn: I didn't hear the question, sir.

(Whereupon, the question was read.)

A. The tabulation runs back to 1926 when we began refining.

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206 Q. Mr. Giles, the figures that you have given for the years 1946 and 1947 you state were in short tons, raw value? A. Raw material received by the refinery.

Q. Was it all refined by the refinery? A. Yes.

Q. And the number of tons of refined sugar could be ascertained from the figures you have given by using the usual conversion factor? A. Approximately. The
207 conversion factor is conventional and the actual yield varies from year to year, and from month to month.

Q. What is that conversion factor? A. 1.07.

Q. Your figures there are on raw values? A. Yes.

Q. Would you proceed to give the corresponding figures for the years going back to 1935?

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208 Q. We know you gave '46 and '47. Suppose you start with '45 and go back. A. '45, from the Bocachica Mercedita, 59,094 tons. From outside, 24,206 tons. In the year 1944, from Mercedita-Bocachica, 47,843 tons, and from outside 16,549 tons.

In 1943, from Mercedita- Bocachica, 59,740 tons, and from outside, 15,659 tons.

In 1942, from Mercedita-Bocachica, 59,241 tons, and from outside, 10,231 tons.

In 1941, Mercedita-Bocachica, 50,909 tons, and from outside, 46,947 tons.

In 1940, from Mercedita-Bocachica, 50,206 tons, and from outside, 67,842 tons.

For 1939, Mercedita-Bocachica, 49,806 tons, and from outside, 43,013 tons.

For 1938, Mercedita-Bocachica, 60,594 tons, and from outside, 37,218 tons.

For 1937, Mercedita-Bocachica, 59,959 tons, and from outside, 63,469 tons.

In 1936, from Mercedita- Bocachica, 57,399—call it 57,400, because the fraction was more than one half—nearer to the even 400 than 399. From outside, 63,227 tons. For
209 1935, Mercedita-Bocachica, 48,922 tons, and for outside, 68,753 tons. * * * I would like to observe that those figures I am giving are a result of division of the figures before me and if there is a slight discrepancy, it is subject to correction.

Q. Well, I think a division by 2 is probably simple. A. It is fairly simple.

Q. Mr. Giles, the sum of the 2 figures that you have given for each year, when adjusted by the conversion factor, would give the total amount of refined sugar produced by Puerto Rican American for that? A. I should, yes.

Q. Mr. Giles, these outside miles from which you purchased have been stated in the record. Would you state approximately how far each one is from your refinery—just approximately? A. The nearest is about 6 kilometers.

Q. What mill is that? A. The nearest was Bocachica. Bocachica didn't operate in 1947, but prior to that it did.

Q. Now, the others? A. The next nearest is Constancia, Ponce, which is about 12 kilometers, I think, and from that we run on up to—I really don't know exactly which
210 is the farthest.

Q. Would you just mention them all and approximately how far? A. Herminio, located at Villalba, is somewhere near 18 or 20 kilometers. Pellejas is up in the mountains and by road it is over 50 kilometers.

Santa Barbara is—I think it is a little more than 50 kilometers, it is in the mountains over a very crooked road.

San Francisco is something like 35 kilometers, I think. Eureka, near Mayaguez is something more than 50 kilometers, I suppose about 60.

Cortada, east of the refinery is about 14 or 15 kilometers. Aguirre is, I believe, in the neighborhood of 30 kilometers. Caribe was a little closer, call it 20 kilometers, I suppose. Caribe has disappeared in the last year.

Guamani is further than Aguirre, call it 20 kilometers Machete is a little further east—between 35 and 40 kilometers.

Lafayete is still further east, it must be around 45 kilometers.

Cambalache, on the north coast about, I suppose 90 kilometers over the mountains. I believe we got some sugar from Plazuela at one time. That is also on the north
211 coast and approximately the same distance as Cambalache.

By Mr. Lee:

Q. Is that all, Mr. Giles? A. That is all that I recall right now. We didn't every year buy from exactly the same list of Centrals. They varied from time to time.

Q. Would you, just to help counsel out with their briefs, state what portion of a mile a kilometer is? A. Approximately five-eighths.

Q. Five-eighths? A. Five-eighths, of a mile.

Q. Thank you. Mr. Giles, in any of the last six years has Puerto Rican American ever failed to market in the continental United States all its refined sugar that it had available for marketing in the continental United States and did not market for local consumption in Puerto Rico? A. I can't answer that off hand. If you will give me time to look it up I think I can give the answer.

Q. Mr. Giles, would it help you if I stated it this way: Did you not, during the last 9 years, market in the continental United States all your refined sugar for the year

that you did not market for local consumption in Puerto Rico?

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212 A. The point that has me a little confused is whether or not it was shipped and delivered in the calendar year. If you want to take the 8 year period as a whole, I can answer your question from memory.

Q. Let's take it as a whole? A. We did sell all of the refined sugar we produced in the last 8 years, either in the States or locally, except the stock that we now have on hand for delivery to local trade. It hasn't been disposed of yet.

Q. You imply, Mr. Giles, that refined sugar produced in some years for the United States was not marketed until shortly after that year was over. How long would that be? A. That is the point that had me confused as to whether or not the production and the delivery for the calendar year coincided. I recall—

Q. Was it a short period? A. I recall that there were one or two years when sugar was shipped to the States in December for charge against the next year's quota—

213 the following year's quota—and I also recall one instance—it is outside of this period though, it is further back, so I suppose there is no need to mention it.

Q. Would it be correct, Mr. Giles, that all your refined sugar, refined in any year and not marketed locally in Puerto Rico, was marketed in the United States either in that year or very shortly thereafter? A. Fairly shortly. I think I remember that one year the last shipment of the previous year's crop was not made until about the end of February on account of shipping shortages, but in general, I can say that it was marketed within a reasonably short period, under the circumstances.

Q. Would it be correct to say that substantially all the sugar refined at your refinery in any of those 8 years and not marketed locally, was not marketed in the year in which it was refined? A. That all of it was?

Q. Substantially all. A. The greater part of it, yes.

Q. Well, the greater part—is that approximately 85 percent, or 99 percent? A. The percentage I don't quite recall, but as I mentioned, a few minutes ago, there is only one case that I remember now, where the final shipment of the previous year's crop was completed toward the latter part of February.

214 Otherwise, in other years, I think the shipment was completed during the calendar year.

Q. How much was that one shipment, approximately? A. I don't have those records here. It might have been anywhere from 15 to 50 thousand bags.

Q. Do you recall what year? A. No, I don't. It was one of the war years.

Q. That figure you gave was bags, not tons? A. Those were bags, yes.

Q. Mr. Giles, in any of the last 8 years, has Puerto Rican American ever failed to refine all its affiliates' raw sugar? A. As I mentioned a while ago we had shipped this year, 1947, 124,600 bags of raw sugar produced by Central Mercedita.

Q. That was because your— A. Because of the limitations on shipments of refined sugar.

Q. Now, Mr. Giles, it appears that each year you have been able to refine—under or subject to the quota limitations—all the raw sugars of your affiliates. It also appears that each year during this war period all the sugars that you refined from any sources were marketed in the United States that year. You have testified at great length to numerous difficulties in refining and marketing. Those difficulties, is it correct, were not sufficient to prevent

215 you from refining and marketing in that year all the sugar that you could lawfully refine, and all the sugar that you had available for marketing in the United States?

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Mr. Lee: Does the witness understand the question?

The Witness: Yes, I believe so, but I can't agree quite, because I was just looking to see if I could find some data

concerning the year when—the previous year, previous to this year—when we had to ship raw sugar produced by Mercedita. I think it was 1945. I don't find any note concerning a previous shipment of raw sugar—that is, prior to 1947—of raw sugar, but I do recall that—I think it was in 1945—that we had to ship some raw sugar produced by Central Mercedita.

Q. Was the reason that you shipped some raw sugar that you had purchased outside sugars and refined them and so had Mercedita raw sugars in excess of your refining quota? A. I don't recall it exactly, and I don't believe I could answer that correctly without looking up records which I don't have here.

Q. Is it correct that, notwithstanding all these dif-
216 ficulties you have testified to at tremendous length, that you nevertheless were able to market, in the United States, all the refined sugar that you had to market there? A. All of the refined sugar that we produced has been, as I stated before, from export sugar quotas—raw quotas—has been eventually marketed in the United States.

Q. And it has been marketed in the United States notwithstanding all these troubles of transportation you talked about, and plant breaking down, and government orders, and ships, and blackouts, and all the rest of it? A. Notwithstanding all these difficulties—

Q. In other words, you did a good marketing job, not withstanding the war annoyances? A. The marketing job was no particular trouble. The transportation was the trouble, and as I was saying, the refined sugar produced from what we call export quota raws, did eventually reach the United States, except two lots, which, I believe, were sunk at sea. The difficulties were not in the fact that they didn't get here eventually but we were balled up here with lack of space for storage and for shipping and could not produce as we normally would have produced.

Q. Would the figures shown in Exhibit A to the
217 Notice of Hearing as entries during the war years, for Puerto Rican American refinery, have been any

different if the difficulties you enumerated at great length had not existed? A. I think they would have been decidedly different.

Q. How would that be? A. I think we would have been able to secure and market considerably more sugar—secure and ship considerably more sugar.

Q. Did you not testify that you marketed all the refined sugar that you did produce in the year? A. Yes, sir. That was all marketed, and we could have marketed considerably more as was testified yesterday by Mr. Lobo. We could have marketed much more sugar if we could have produced and delivered.

By Mr. Lee:

Q. Do you mean by that that there was a demand for more sugar? A. I understand that there was a demand for considerably more sugar.

Q. And that if you produced more sugar and refined more sugar, could have acquired more sugar, you could have met that demand? A. Not all of it.

Q. Some of it? A. Some of it.

218 Q. But as to the sugar that you did acquire by purchase or acquire from your affiliates, or from all your usual sources of supply, and refine, you were, notwithstanding these difficulties, able to market it in the United States? A. I think I have answered that.

Q. Was the answer yes? A. I think so. You know if you clock a runner at the beginning of a race after the others are half way through and then tell him to get up and go on and "see what you can do," he is not likely to break the tape first.

Our difficulties are—

Presiding Officer Gifford: I think this question has been pursued so definitely in the record, that notwithstanding all the obstacles, eventually your quota was marketed.

The Witness: The obstacles affected our ability to produce and ships, not our ability to market.

Presiding Officer Gifford: I think the record clearly shows that.

Mr. Lee: Thank you.

By Mr. Lee:

Q. Mr. Giles, one more question: Did the Commodity Credit Corporation, ever, one application of Puerto Rican American, refuse to release raw sugars of Puerto Rican American to it for refining within the limits of the
219 allotments under the CCC contracts? A. The Puerto Rican American had no raw sugars until it bought them. The Puerto Rican American made no application for release of raw sugar. It was the producer of the raw sugar who had to make the application for the release for disposal to a refinery in Puerto Rico.

Q. Mr. Giles, were any raw sugars that Puerto Rican American desired to acquire and refine, and for which an application for release to Puerto Rican American for refining was made to the CCC, ever refused by the CCC? A. Yes, sir.

Q. Will you state instances of that—let me qualify that as I did my original statement—when the sugars that it refined would have been within your allotments under the CCC contract? A. The allotments were made under the CCC contract. That is, the contract provided that all raw sugar was sold to the CCC. Then in the second paragraph, it is provided that on application of the producer, which is the raw sugar mill, such amounts as approved by the CCC would be released for sale to a Puerto Rican refiner, and to be specific the application of central Mercedita for release of its total production to a Puerto Rican refiner was refused and as I stated a while ago, Mercedita was obliged to ship 124,600 bags.

Q. Was it ever refused when the amount of the sugar, if refined, would ever be within the allotted amounts
220 under CCC contracts? A. The amounts allotted under all the CCC contracts were dependent on the ap-

plications submitted by the producers, and the application submitted by Central Mercedita, was, according to the estimates of production, at the time the application was submitted, not in excess of the allotment for shipment to the United States.

Q. Mr. Giles, let me try once more, and see if we can break the tape this time.

You referred to 1947. There were 130,000 sold tons of refined sugar which were allotted among the refiners. The releases of the CCC were scaled to fit those allotments. Was there ever a release refused Mercedita, which would have fitted the allotment? A. The Mercedita request for release was sent into Commodity Credit Corporation early in the year. I think it was in February or maybe it was March. The definite allotments or releases of raw sugar for refining in Puerto Rico were not made until toward the—were not notified to us officially until the later part of May. At the time the Mercedita application was sent in, the estimated total production for Central Mercedita was 60,000 tons, and that was less than the amount eventually allotted to the Puerto Rican American refinery for shipment to the States.

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221 Redirect Examination

By Mr. Antonsanti:

Q. Mr. Giles, isn't it true that although you were able to market all the refined sugar that you produced your difficulty was not in marketing, but it was in producing more? A. I think I made that statement: That the marketing was not the problem. It was the producing, the refining; or obtaining supplies for refining, and the transportation.

Q. Consequently, your difficulties hampered your production, not your marketing? A. I used the illustration about the man in the race because I think it is applicable. Our production was choked in the early part of the game. The sugar that we did not produce, we could not produce on account of restrictions, we could never market no matter how much the market was calling for.

Q. I suggest to you, Mr. Giles, that there were cases where you could have obtained more raw sugar and didn't, is that correct? A. There were cases where we could have obtained more raw sugar if we could have obtained the transportation and had been able to dispose of the
222 refined product and make room for the incoming raw sugar.

Q. Do you recall the Lafayette Case, one of the Centrals from whom you purchased outside sugars? If you recall it will you explain it? A. I recall some negotiations with Central Lafayete in obtaining raw sugar. At the time—that was during the emergency period—Lafayete was shipping not through their normal port Arroyo, but through Jobos, and central Aguirre port, and was allowed four cents by Commodity Credit extra payment on account of the longer haul from the mill to the port. We proposed to Lafayette to buy a certain amount of sugar from them for refining. They replied that they would be glad to sell it to us if we would pay that four cents or if Commodity would continue to allow that four cents to them for the extra transportation provided they made the delivery at Mercedita for the refinery.

223 Q. Then I take it that they would have been penalized by four cents? A. That was the attitude if the Commodity replied they would not make an allowance. Then if LaFayette delivered the sugar to the refinery, they would have four cents less income than they would by shipping it through the Port of Jobos.

Q. Do you recall whether that was done to discourage the transportation of raw sugar inland in Puerto Rico? A. Well, I know that it was done. I wasn't at the end where the purpose was clear.

Q. But it had the result? A. It was the result.

Q. Of eliminating your production. It had that result? A. It had that result of limiting our production, because we didn't get the raw sugar and couldn't refine it.

Q. Do you recall an incident with Aguirre Sugar Company or Cordalo, affiliate of Aguirre, where you were not able to get a release—they were not able to get a release of their raw to refine at Puerto Rican American? A. That was early this year. We made a contract with the owners of Cordalo to take a certain amount of their raw sugar for refining and when we had taken a considerable part of it, we were notified that our allotment for shipment to the States was so much, and in view of the fact that our own production and other contracts exceeded that amount allotted, we arranged with Aguirre to cancel the
224 remainder of that raw sugar contract, and the sugar did not come to Mercedita.

Q. Do you remember of a case in Aguirre where a refusal was made of the transfer of sugar until Aguirre was able to prove it had no bags? A. There was such a case. We got an addition of 1,500 tons to the export—direct consumption export allotment due to that circumstance.

Q. Had Aguirre had enough bags, you wouldn't have gotten that sugar? A. If Aguirre had been able to ship the sugar, they would not have turned it over to us, the export quota.

Q. What year was that; do you recall? A. That was this year.

Q. This year, 1947? A. 1947.

. . . . . .

By Mr. Garcia-Mendez:

Q. Mr. Giles, you testified to numerous difficulties during the war years, and you referred to gasoline rationing. A. Yes.

225 Q. Wasn't it a fact that the OPA gave preference for the handling of sugar cane and sugar all throughout Puerto Rico? A. I don't know just how much preference they gave, but they did arrange for rationing, for supplies to be furnished to trucks hauling cane under the rationing regulations.

Q. Didn't that regulation provide to give all gasoline necessary for the handling of the cane and the sugar?

. . . . . .

A. The supply was eventually sufficient to move—as I recall, there were years, though, when not all the standing cane was cut. It was not all ground.

Q. But it wasn't because of lack of gas, was it? A. Some of it, I think, was. It slowed down the transportation. They couldn't get it into the mill in time. The mill couldn't continue to grind cane for one or two Colnas who delivered two or three tons a day.

Q. Was that regulation equally applicable to all other refineries? A. I presume it was.

226 Q. The regulations of the Office of Defense Transportation, weren't they equally applicable to all other refineries? A. Supposedly.

Q. The shipping transportations, weren't they equally applicable to all other refineries? A. I presume they were, but the effect on a concern that has a small amount of transportation is much less, involves much less difficulty than when the amount to be transported is three or four times as great.

Q. Don't you think it should be proportionate to the amount to be shipped? A. No, the smaller production, in the first place, doesn't have the problem of storing sugar pending transportation, not to the same extent, and then it doesn't have the problem of transporting a large amount of sugar in a short time while the steamer is loading.

Q. Well, you would have a proportionate amount of trucks to haul it, wouldn't you? A. Not necessarily.

Q. Now, then, how do you explain that while other refineries shipped into continental United States not only what they used to refine in the previous years, but sometimes twice as much; how do you explain, if they could overcome those difficulties, you could not overcome them?

A. I think I have just explained it. They had much

227 smaller quantities to handle. To move 10,000 tons

of sugar doesn't involve the same complications as moving 25,000 tons.

Q. Well, in the case, for instance, of Igualdad in 1941, Igualdad shipped 13,017 tons into continental United States against 79,237 Puerto Rican American. That is about one-sixth. Igualdad about one-sixth as much as Puerto Rican American, while in 1947, Igualdad shipped 29,965 against Puerto Rican American 67,000, or about 50 per cent Igualdad to Puerto Rican American. How could you explain that in view of your difficulty, that Igualdad could go up to twice as much while Puerto Rican American went below its 1941 shipment? A. I think the statement I have made explains it. It is much easier to increase from 13,000 to 29,000 than it is to maintain 79,000, particularly when the other Centrals take a bite out of the quota formerly assigned to the Puerto Rican American sugar refineries. Not only we couldn't handle the sugar physically, but we couldn't get the allotment.

Q. That is in spite of the fact that the difficulties and war regulations were equally applicable to all? A. Equally applicable, but the incident of those regulations on your concern was not the same as on the larger concern.

Q. Doesn't that account for ability to market? A. No, sir. That is ability to have transportation facilities
228 which were not under control of any one in Puerto Rico except as delegated from somewhere else.

Q. The regulations regarding planting of 7½ per cent for other crops, and 20 per cent for other crops in certain years, was it equally applicable to all producers? A. I suppose so.

Q. It wasn't applicable to Puerto Rican-American, was it? A. No.

Q. Was it applicable to Igualdad? A. Igualdad, at that time, I don't recall, but at the beginning, I understand Igualdad was the mill and the refinery. Later, I think it was separated to—call it the Western Sugar. Igualdad

certainly had the regulations applied to their canegrowing, but the Western Sugar probably did not.

Q. You testified, Mr. Giles, that you purchased some of the raw sugar from other raw sugar companies. A. Yes.

Q. And among them you referred to Constancia? A. Constancia Ponza.

Q. How did you haul that sugar to Puerto Rican-American, by railroad? A. No, by truck.

Q. What about LaFayette; did you haul by truck or train? A. LaFayette, when we would buy the sugar,
229 I think all of it was hauled by truck.

Q. What about Cambalache? A. Cambalache, by truck.

Q. All by truck? A. I think all by truck. There may have been some, a few, railroad cars. My recollection is that nearly all, if not all, was by truck.

Q. What about Plazuela? A. Plazuela was, as I remember it, by truck.

Q. Did you have connections between Plazuela and Puerto Rican-American? A. Yes.

Q. Why didn't you use the railroad. A. The same reason, the question of cost came in.

Q. Did you have railroad connections with Cambalache? A. Yes.

Q. Did you have railroad connections with Eureka? A. We could have had the Eureka, but they preferred to engage the trucking on sugar.

Q. What about LaFayette? A. LaFayette had no direct connection.

Q. Couldn't you buy some of that sugar from other mills which had railroad connections with you? A. Perhaps, but the question of cost always came in.

Q. What about Central Rufina? A. Central Ru-
230 fina is fairly close.

Q. How far is it? A. Closer than San Francisco.

Q. How far is it? A. I don't know.

Q. You say San Francisco is about 35 kilometers? A. Then Rufina would be about 30.

Q. Do you have railroad connections with Rufina? A. Yes.

Q. Would the difference in cost be very material? A. In a good many cases quite material. Also the shortage of railroad cars. As you probably know, most of the railroad cars were engaged in taking sugar to San Juan, and were used as warehouses after they got to San Juan for several days. There were not available for transportation of sugar on the South Coast.

Q. Now, you referred, Mr. Giles, to the fact that there were Army regulations as to the use of lights on cars and that the local law required— A. I think that regulation was Coast Guard.

Q. Coast Guard. Wasn't it a fact that all local laws or regulations were left in abeyance in every case in which either Coast Guard or Army regulations or anything in favor of the war effort was necessary? A. They were left in abeyance some times, and sometimes they were disregarded and violators didn't get caught.

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Q. As a whole, weren't they left in abeyance? A. In general, I would say yes.

Q. In your statement, you said that on February 21, 1942, you only had 15,000 bags of refined sugar to be shipped by Bull Insular Line; is that correct? A. No. My statement was that the Bull Insular Line had notified us they would not accept more than 15,000 bags per week. We had a lot more than that.

Q. Was there any other shipping company with whom you were shipping your sugar at that time? A. We had to ship on the ships that were notified to us by the War Shipping Administration. There were others.

Q. Weren't there other ships beside the Bull Insular Line ships? A. There had been other lines operating. At At the time I speak of, no steamship line was operating on its own account. They were operating as agents of the War

Shipping Administration and they signed the documents in that way.

Q. When you received that advice from the Bull Insular Line, did that last long, that you only had 15,000 bags, or could you eventually ship much more than 15,000 bags? A. Eventually, we shipped considerably more. That was on February 21. On March 14, we had accumulated 400,000 bags. On March 18, we had accumulated 445,000 bags.

Q. On May 8, you had accumulated about 600,000
232 bags? A. 610,000 something.

Q. Did you eventually ship all that sugar? A. We eventually shipped all that sugar, but it wasn't so easy to continue refining and storing after we had accumulated that much.

Q. What was your storage capacity, Mr. Giles? A. As I stated, 600,000 bags of refined sugar provided we had nothing else to store, but during the operation period, during the crop, we could not use all that space for storing refined sugar. We had to receive raw sugar and had to have a little elbow room to move around.

Q. That was your own storage capacity in your own warehouses? A. Yes.

Q. Couldn't you rent warehouses? A. Excuse me.

Q. I am sorry. A. Including warehouses that we owned at Ponce Port.

Q. What about rented ports? A. In that 600,000, there were no rented warehouses.

Q. Could you rent warehouses at Ponce? A. We did.

Q. How much storage? A. At one time we had a little over one million bags stored.

233 Q. You were always able, then, to rent storage?

A. At that time we were able to rent enough storage to take care of one million bags. Later, those warehouses were occupied by other materials and we couldn't get them.

Q. What about other warehouses? A. Other warehouses did not exist.

Q. Didn't exist. Didn't you ever try to build new warehouses? A. We tried to get materials to build a new warehouse and our request for priority was delayed and finally refused.

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234 Q. Mr. Giles, you stated that you went down into negotiations with LaFayette for the purchase of some of their sugar and there was a 4 cent differential, and that was why you didn't go ahead into the negotiations? A. That was the allowance made by the Community Credit for extra transportation cost to LaFayette, and then LaFayette people advised us that the Commodity Credit declined to make that allowance to them if the sugar was delivered at Mercedita. And that was the final straw that broke down the negotiation. We didn't get the sugar.

Q. Did you get from some other source the sugar you planned to get from LaFayette? A. No.

Q. Wasn't it worthwhile to pay the 4 cents and get the sugar?

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235 The Witness: I can't answer that "yes" or "no". I don't have the calculations before me, but the fact is that we decided not to complete the arrangement on that basis.

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236 **Juan E. Mayoral** was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Antonsanti:

Q. Will you give your name to the reporter, please? A. Juan E. Mayoral.

Q. Will you state your occupation? A. Engineer.

Q. Are you connected with the Puerto-Rican American Sugar Refinery, and how? A. Yes. I have been gen-
237 eral superintendent of manufacturing corporations of the Puerto Rican-American Sugar Refinery since 1933.

Q. Are you a graduate engineer? A. Yes. I graduated from the Massachusetts Institute of Tec nology in chemical engineering in 1929.

Q. State your experience. A. In 1930, I obtained my Master of Science in the profession from the same institution. From the time I left the Institute of Technology, I worked for three years in the field of metals and alloys at Driver-Harris Company at Harrison, New Jersey, and since 1933, I have been connected with the Puerto Rican-American Sugar Refinery.

Q. Have you been familiar with its operations since that date? A. Yes. I have been in charge of production and supervising, full supervision of the mechanics of maintenance and chemical work.

Q. Mr. Mayoral, I believe you testified here in 1938 or 1939 as to the capacity of your refinery at that time.

Will you give us that figure? A. I testified in 1938 that our refining capacity was 700 tons per day, but that we were making enlargements to increase that capacity to 800 to 850 tons per day.

Q. You were then making those enlargements? A.
238 In 1939, we produced a record which was requested of all producers by mutual agreement covering ten days of operation in which we averaged over 850 tons per day. That was our capacity in 1939 and so it is in the records of this department from certified copies of the production record.

Q. Since that date, 1939, have you made any improvements to your refineries? A. Yes. Today, due to improvements and enlargements, we have a capacity that I estimate conservatively at at least 10 per cent over the 1939 capacity.

Q. Now, one more question, Mr. Mayoral. During all these war years, what factor principally limited your production? A. We had a number of factors that were covered by Mr. Giles. There were many. But the main factor was the difficulty of shipping sugar, which filled our warehouses and consequently made us slow down. The other major factor was the inability to obtain sugars caused by the same factor. In other words, if we knew that we were unable to ship sugar, we couldn't contract to receive sugars that we knew we could not receive nor ship. I would like to expand on that, that these mills that we buy sugar from, in their great majority, do not have storage capacity for the raw sugars. For years, they have been manufacturing their sugar, putting it on the truck right out from
239 their scales, and shipping it to us, so that they have practically no storage capacity, and they would sell us the sugar, but one of the conditions was that we would have to take this sugar, say, as it was produced, which we couldn't very well do if we had our warehouses full.

Q. Had you not been limited, then, by these difficulties, would you have been able to produce and ship a great deal more sugar than you did during the war years? A. There isn't any question about it.

Q. There is nothing inherently wrong with your refineries that would limit you, outside of storage space and shipping trouble? A. The refinery is exactly the same equipment, very well kept up, that we had in 1939 when we averaged 850 tons per day in that run that was made to prove the operating capacity, except that it has been enlarged by about 10 per cent.

Q. Have you examined the figures in Exhibit A, presented by the government? A. Yes, I have.

Q. Pardon me. Not Exhibit A, but Exhibit No. 4, I think it is. Will you please refer to it?

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240 Q. Do you have it before you? A. Yes, I have examined it. I have it before me.

Q. Is the figure for the sugar in that exhibit corresponding to Puerto Rican-American a correct figure? A. The figure is correct as far as arithmetic and as far as corresponding to the number of days it states. However, I do not believe it is a correct reflection of the capacity of the refinery.

Q. Why? A. Because all during 1947 as well as during other abnormal years, we were slowed down.

Q. So, this figure in Exhibit No. 4, Puerto Rican-American, reflects the five-day run, the slowed down process? A. That is correct.

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Cross Examination

By Mr. Garcia-Mendez:

Q. Mr. Mayoral, do you mean to say that since Plazuela has no storage— A. I said almost.

Q. Now, let us go to Plazuela. Does it have a large
241 storage warehouse? A. Yes, I think Plazuela has.

Q. What about Cambalache? A. Cambalache has.

Q. What about Aguirre? A. Aguirre itself, has, but Cordalo, an affiliate of Aguirre, made it very clear to us that we had to take the sugar daily, and I had calls from Mr. Rice, and from the man at Aguirre—I don't recall his name now, but he is the manager at Aguirre—almost daily warning me if we didn't take the sugar away, they would have to dispose of that sugar in a different manner.

Q. What about LaFayette, do they have warehouses? A. LaFayette has warehouses.

Q. Large warehouses? A. I don't know the exact amount.

Q. What about Eureka? A. Eureka has warehouses.

Q. Do they have big warehouses, too? A. I don't know.

Q. You don't know. What about San Francisco? A. San Francisco apparently doesn't have very much warehousing capacity because they have always pressed us for taking the sugar away as they make it.

Q. What about Juanita? A. I don't know about
242 Juanita.

Q. Constancia? A. Constancia has practically no warehouse capacity.

Q. Would you say it has no warehouses for, say, 15 days' production? A. No, I would say—I would not only say that, but I would like to say for the record that we have received and refined practically all the Constancia sugar for every year except 1947, and that in 1946, in order to keep Constancia's good will, we actually had to shut down our factory in order to receive their sugar because they were pressing us and threatening us that in accordance with previous contracts and previous practice, we had to receive their sugar.

Q. But did they not have any warehouse? A. They did not have.

Q. They did not have? A. In 1946.

Q. What about 1947? Do they have now? A. In 1947, we did not receive their sugar and they made several efforts to secure warehouses, and I don't know how successful they were, but we did not receive their sugar in 1947.

Q. What about Herminia? A. Herminia has no warehouses.

Q. How big is Herminia? A. Herminia is a mill
243 that grinds about 300 or 350 pounds of cane per day.

Q. Isn't that the smallest mill in the whole island, or one of the smallest mills in the whole island? A. It is a small mill.

Q. That is all. A. I would like to include Pellejas, which also has very little warehouses, and insisted that we receive their sugar on a daily basis, and also Santa Barbara, which also conditioned the sale of sugar to our receiving it daily, their daily output.

Q. Does Pellejas have any warehouses at all? A. I would like to make it clear that I am not an expert as to how much warehousing Pellejas has, or other warehouses, but I am in full knowledge of the fact that these people con-

ditioned their sales of sugar, and their explanation was that they did not have sufficient warehouse capacity. They conditioned their sales of sugar to our taking their production out of the plant daily, and I received calls and threats of these friends of ours that we had to receive their sugar on a daily basis because they did not have sufficient warehouse capacity.

Q. Now, as a matter of fact, do you know whether they had it or not, from your own personal knowledge? A. I know that Herminia, Santa Barbara, Constancia, Bocachica, when we operated there, which was during the whole period involved with the exception of one year, had
244 practically no storage capacity.

Q. When you say "practically"; what do you mean? A. Practically, I mean—

Q. For a week's run? A. For a few days.

Q. For a few days' run. So the one that had the least warehouse had just a few days' warehousing storage? A. That is correct.

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245 **William M. Requa** was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lee:

Q. Mr. Requa, will you state your name and residence? A. My name is William M. Requa. My residence is 2114 Key Boulevard, Arlington, Virginia.

246 Q. Are you an economist and statistician by profession? A. I am.

Q. Were you graduated from college? A. I was graduated from Cornell University in 1931, with a B. S. Degree.

Q. Did you major in agricultural economics? A. I did.

Q. Did you serve as an economist and statistician with the Dairymen's League Cooperative Association of New York? A. I did for a period of about six years.

Q. And what was your employment following that? A. Since that time I have been with the Association of Sugar Producers of Puerto Rico at 732 Shoreham Building, Washington, D. C.

Q. That is your present employment? A. That is my present employment.

Q. Are you employed there as a statistician and economist? A. I am.

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254 Mr. Bagwell: Mr. Presiding Officer, before you recess, I would like to ask, in view of the reference that was made yesterday, testimony by the government witness, to a number of regulations and other public documents of the Department, that certain of these regulations and documents which I shall identify be officially noticed for the record. I would like to do that at this time so that if any one has any question about it, or wants additional information as to the identification of these documents, that I may be able to get that during the noon recess, and supply it for the record.

Presiding Officer Gifford: All right, you may do so.

Mr. Bagwell: It will take me just a few minutes.

Presiding Officer Gifford: All right.

Mr. Quinn: No objection.

Mr. Bagwell: These documents are as follows:

255 Puerto Rico Sugar Order No. 11, issued by the Secretary of Agriculture, June 1, 1938, and under which the direct consumption portion of the 1938 sugar quota for Puerto Rico was allotted to the various refineries in Puerto Rico.

Secondly, Puerto Rico sugar order No. 13, issued January 5, 1939, under which the direct consumption portion of the 1939 sugar quota for Puerto Rico was allotted among the various refineries in Puerto Rico.

Third, Puerto Rico Sugar Order No. 16, issued November 30, 1940, under which the direct consumption portion

of the 1941 sugar quota for Puerto Rico was allotted among the various refineries in Puerto Rico.

Fourthly, a proclamation issued by the President of the United States April 13, 1942, in which he found the existence of an emergency with respect to sugar and suspended Title II of the Sugar Act of 1937.

Fifth, a proclamation by the President of the United States issued November 28, 1947, in which he found the end of the emergency with respect to sugar, and removed the suspension of Title II of the Sugar Act of 1937.

Sixth, War Food Order No. 63, under which import controls over sugar were exercised. This order expired with respect to sugar on October 31, 1947, pursuant to the provisions of the Sugar Control Extension Act of 1947, public law 30 of the Eightieth Congress, which I would like also to be officially noticed, if there is any necessity for it.

256 Seventh, sugar export control order 1, under which the exportations of sugar were controlled, and this order expired also on October 31, 1947, by reason of the expiration date given in the Sugar Control Extension Act of 1947.

Eighth, War Food Order No. 7, issued by the Secretary of Agriculture, under which there was an allocation of raw sugar to the various refineries in the continental United States. This order was revoked by the Secretary of Agriculture, October 8, 1947.

War Food Order No. 51, issued by the Secretary of Agriculture, under which the production, distribution, and use of edible molasses was controlled. This order was revoked April 18, 1947.

The appropriate revocation orders were published in the Federal Register on or about the date which I have specified as to each of them.

The next one is CCC, Commodity Credit Corporation, importer reimbursement program for importers of the 1947 crop of Cuban and Puerto Rican direct consumption sugar. This program was issued by the Department of

Agriculture and expired October 31, 1947. Copies of that are available to any one upon request.

There are one or two other things. Regulation establishing the price control over sugar which was made
257 effective August 14, 1941. The price control over sugar expired with the expiration of the authority to impose such controls under the Sugar Control Extension Act of 1947. That date was October 31, 1947.

Rationing Order No. 3, effective April 20, 1942, under which sugar was rationed.

The next one is the order which removed the rationing. There were two orders which removed the rationing of sugar. The first one being effective June 12, 1947, and which ended the rationing with respect to consumers and institutional users. The other order was made effective July 28, 1947, and under this industrial rationing was discontinued.

Mr. Lee: Who issued those orders?

Mr. Bagwell: These orders were issued by the Secretary of Agriculture.

The price control, if I haven't already stated it, the price control orders were in effect until the expiration of the authority contained in the Sugar Control Extension Act of 1947, which was October 31, 1947.

Those are the ones that I desired to present.

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261 Mr. Bagwell: Mr. Presiding Officer, I would like to make one more request with reference to matters of which official notice may be taken in connection with this hearing.

This relates to the manner in which the refineries in Puerto Rico are organized. The information is contained in a publication known as "The Gilmore Puerto Rican Sugar Manual, 1946-1947."

That is a publication that is available to the Department here, and I would like to ask—

Presiding Officer Gifford: Is it generally available to the public?

Mr. Bagwell: Yes, it is generally.

Mr. Quinn: It is generally recognized as authoritative, is it not?

Mr. Antonsanti: May we have it on the record that the data appearing in said journal is supplied by the refiners themselves?

Mr. Bagwell: I would like to say, although I will not refer specifically to pages the purpose for which it would be used would be to get the organization setup of
262 the refineries and not for any other purpose.

Mr. Lee: Will you refer to the specific pages that you want?

Mr. Bagwell: I can by looking through here, I think. It would take a little while to go through it.

Presiding Officer Gifford. Do you think it would be specific enough for showing the purpose to be of showing the organizations of the refineries listed?

Mr. Lee: Yes.

Presiding Officer Gifford: As listed in the notice of hearing?

Mr. Bagwell: In other words, as to any other facts in here there would be no official notice taken of such facts in this publication.

Mr. Lee: All right.

Presiding Officer Gifford: For the purpose stated, it will be made a part of this record by reference only so that official notice may be taken of it.

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263 **William M. Requa**, the witness under examination at the time of the recess, was recalled, and having been previously duly sworn, was further examined and further testified as follows:

Cross Examination

By Mr. Antonsanti:

Q. Mr. Requa, by whom are you employed? A. The Association of Sugar Producers of Puerto Rico.

Q. Will you briefly describe what the Association of Sugar Producers is and what composed of? A. The Association of Sugar Producers of Puerto Rico is a trade association composed of the majority of processors of raw sugar, that is, raw sugar milling enterprises, and some of the larger growers of cane.

Q. Mr. Requa, none of the following three refiners are members of the association: Puerto Rican American Sugar Refinery, is that correct? A. They are not a member of the association.

I might say that no refiner is a member of the association as a refiner.

Q. Correct.

Now, I will ask you, Igualdad Western? A. Central Igualdad is a member.

Q. Central Igualdad is an affiliate of Western Sugar Refining? A. That is my understanding.

264 Q. Roig, El Ejemplo and Central Roig are affiliates of the Roig Refinery, are they not? Roig Refining Company? A. I am not sure which is affiliated with whom. There is an interrelationship there.

Q. They are affiliated interests, the two raw mills I have mentioned? A. I think we can say that.

Q. And this refinery? A. That is right.

Q. And although the refinery is not a member of the association, the two affiliated companies are members of the association? A. The two raw sugar milling enterprises are members of the association.

Q. However, you did state the Puerto Rican sugar refining was not a member? A. That is right.

No refiner is a member.

Q. Do you know whether any raw sugar mills affiliated

with Puerto Rican American Sugar Refining is a member of the association? A. At the present time, it is not.

Q. It is not a member at the present time? A. That is right.

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281 By Mr. Quinn:

Q. If you prepared these charts (Exhibits 11, 12, and 13) as an economist, would you prepare them and include the years 1942 to 1946 without any footnotes thereon, or any explanatory notes explaining the swing-ups or downs? A. I don't see that any footnotes are required in the circumstances.

Q. As an economist, you feel you would include the war years without comment? A. I believe so.

May I elaborate on that?

Q. Yes. A. The reason that I say that is that the years '42 through '46 were years in which no quotas had been in effect on direct consumption sugar.

Technically the contract negotiated with Commodity Credit Corporation, between Commodity Credit Corporation and raw sellers, provided certain raw sugars to
282 be reserved from out from under the contract.

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283 The Witness: Going on with that line of thought, the contract provided for certain amounts of raw sugar to be reserved from under the contract terms upon application by the seller and upon approval by Commodity Credit Corporation. Approval by Commodity Credit Corporation could perhaps be regarded as a limitation. For that reason I used the word "technically" about which Mr. Quinn was asking me, but actually during those
284 periods my understanding of the matter is—this has been confirmed with conversations I have had with officials of the Sugar Branch in the past—that during those years approval of the applications for reserved amounts was automatic upon application by the seller.

By Mr. Quinn:

Q. As shown by Exhibit A in Federal Register in between the years '42 to '46, at no time did all total shipments from Puerto Rico direct consumption exceed 126,000 tons; is that correct? A. That is right, during which time everybody had the right as the program was handled to ship in as much as he wanted to.

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Q. How could you say that, Mr. Riqua, when the licensing of the amount of sugar was entirely in the hands of the Commodity Credit Corporation? A. Because of the fact, as I just brought out, that approval of releases was
285 automatic on the part of the Commodity Credit Corporation.

Q. But, do you know, as a matter of fact, the Commodity Credit Corporation wouldn't release above a certain amount of sugar for direct consumption? A. That upper limit, as I understand, was never put to the test during the war years and prior to 1947.

Q. But in no time, to your knowledge, did Commodity Credit Corporation approve for direct consumption for release to direct consumption, in excess of 126,000? A. I don't know whether they did, or not.

Q. What do the figures in the Federal Register show? A. I know figures in the Federal Register indicate the total deliveries were less than that.

Q. Those figures represent all entries during those years of direct consumption? A. That is right.

Q. You testified this morning you compared the year 1939 to 1947 in reply to some questions by Mr. Lee; is that correct?

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287 By Mr. Antonsanti:

Q Mr. Requa, as an economist, do you believe that the period 1941 to 1947 was a normal representative period? A. If you would change that to 1942—

Q. I will change it. A. From 1942 to 1946 I would regard it more for this purpose as a normal year. I would regard it for purposes of this hearing as a normal year.

288 — Q. You would as an economist? A. For the purpose of this hearing, yes.

Q. You would? A. Yes.

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By Mr. Peyton:

Q. Your last answer prompts a question, Mr. Requa. Are you familiar with price controls on sugar? A. Yes, in a general way.

Q. Would you consider, as an economist, that price controls on sugar interfered in no way with normal supply and demand operations? A. I think price controls were a factor in sugar production. Of course, in addition to price, however, we were operating under a subsidy program during that period in which most producers found it somewhat profitable to engage in production of sugar.

* * * * * * * * * *

289 Q. Do you think rationing controls constitute a proper basis for choosing a period as normal? A. I think the witness of Puerto Rican American testified here that the demand for sugar was such that he could have filled considerably more shipments than he did.

Q. Is that normal in sugar? A. If its abnormal, its abnormal in the way of encouraging production on the part of the entity, such as Puerto Rican American, rather than the opposite, I would think.

Q. Do you consider actually the war period, as an economist now, do you consider actually the war period as having no abnormal economic effects on the marketing of sugar? A. Mr. Peyton, that was gone into at great

290 length this morning.

Q. I ask your opinion. You can answer that yes or no. A. I am about to give you my opinion. The war period undoubtedly caused a great many annoyances to all

producers of sugar, refined, raw, or other types,—Puerto Rican American and undoubtedly other refiners down there. Purely from gauging results from the looks of actual physical entries, however, it would seem to me that the problems and annoyances were not insurmountable; that they had been met at least by certain refining interests down there, and met satisfactorily.

* * * * * * * * * *

291 **Alfredo Ramires de Arellano, Jr.** was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Garcia-Mendez:

Q. Will you please state your name? A. My name is Alfredo Ramires de Arellano, Jr.

Q. Will you please state your occupation or profession? A. I am a chemical engineer. At the present time I am President of Western Sugar Refining Company.

Q. And did you graduate as a chemical engineer? A. I finished college as a chemical engineer, and graduated in 1937.

Q. How long have you been connected with Igualdad Western? A. I presume in a technical capacity?

Q. Either technical capacity, or as executive officer, or director of the company? A. I am a director. I have been connected with Western Sugar Refining Company since its formation, since the beginning, with an interim pe-

292 riod of three years during which I was not there all the time while I was in the Army.

Q. As President of Western Sugar, are you familiar with the development of the business of Western Sugar and Igualdad in the last, say, eight or ten years? A. Yes, sir; I am, since the foundation of both enterprises.

Q. You are aware of the formula permitted by the Department of Agriculture for the distribution of direct consumption sugar for the year 1948? A. Yes, sir; I am.

Q. Would you please state your point of view in connection with that formula, or any formula proposed by you? A. Will it please you if I read it into the record? I have a few excerpts I made here on comment on that.

Q. All right. A. I will start by discussing the formula proposed by the Department of Agriculture.

The formula proposed by the Department of Agriculture gives equal weight to both "ability to market" and "past marketings".

1. Ability to Market:

According to the proposal of the Department of Agriculture, "ability to market" is to be measured by the highest one year's marketing in the thirteen years, 1935 to
293 1947, inclusive. As we see it, "ability to market" is a prospective or future element and must be measured by immediate past performance. The Department's proposed formula takes widely separated years for the various companies, to wit:

1935 for Puerto Rican American Sugar Refinery; 1936 for San Francisco; 1939 for Central Guanjca; 1940 for Roig; 1941 for Camus; 1947 for both Central Aguirre and Igualdad-Western.

The record of performance for the immediately preceding year should be the yardstick. Based on the Department's formula Compania Azucarera de Camuy, for instance, would be allotted 3742 tons on the basis of "ability to market".

"Actually, it has no such present ability and, as a matter of fact, it has not delivered any direct consumption sugar during the years 1942 to 1947, inclusive.

"The proposed measure of 'ability to market' is also contrary to an established ruling of the Department. In Puerto Rican Sugar Order No. 13 issued January 5, 1949, it was stated:

"There are two important factors to consider in determining 'ability * * * to market' direct consumption
294 sugar. These two factors are:

1. Refining capacity and

2. Current marketings of direct consumption sugar.

"Both of these factors are essential to a determination of present ability to market sugar. The refining capacity of processors can best be determined by actual performance for a representative period of time, rather than by mere rated mill capacity. It is believed that the best ten consecutive working days should be taken as the basic performance period.

"However, in view of the fact that most mills in Puerto Rico follow the practice of discontinuing operations for the weekend or a similar period (R. pp. 153, 169, 273, 323), it was deemed necessary, in the interest of fairness to all, to use the best five consecutive working days of the basic ten-day period. This five-day period is deemed to be a representative period for the purpose of measuring mill refining capacity.

"In regard to the second factor, it is believed that the period from January 1, 1938, to October 24, 1938, affords the best available measure of current marketings and
295 should be considered in determining 'ability * * * to market.' This is deemed to be a fair measure in view of the fact that all 1938 allotments had been filled, or substantially filled, on October 24, 1938 (R. Ex. 4)."

This is a part where I want to call your attention to the record.

"Since it is apparent from the record that no processor will receive an allotment equal to the amount of direct consumption sugar which could be marketed, it is important in determining ability to market to give such weight to the factors used as will afford the best relative measure of such ability for all processors.

"Accordingly, it is believed that the factor of 'refining capacity', as measured by actual performance for the period stated, has a greater relative importance in measuring 'ability * * * to market' than has the factor of current marketings."

Again I call attention to this other section which is underscored.

* * * * * * * * * *

296 "This results from the fact that current marketings could not exceed the allotment, whereas the production of sugar during the five consecutive working days was not subject to a similar limitation.

"Therefore, it is believed that 'ability * * * to market' should be measured by giving three-fourths weight to the highest average output during the best five consecutive days of the above-mentioned basic ten-day period and by giving one-fourth weight to current marketings for the period from January 1, 1938, to October 24, 1938, as shown by the quantities of sugar certified for entry into the continental United States during that period."

If the Department is to be consistent with its previous ruling, it is evidence that since current marketings for the year 1947 exceeded the 126,033 tons normal allotment, that year's marketings constitute a fair and equitable measure of "ability to market."

In the above-mentioned Sugar Order No. 13, the Department took the current marketings for the previous year as as the yardstick in measuring the "ability to market."

If in 1939, the Department regarded the preceding
297 year as the fair measure, then the year 1947 must likewise be regarded as a fair measure for determining ability to market in 1948.

The market allocations for 1947, were made in proportion to the 1946 deliveries, when there were no restrictions on the entries of Puerto Rican direct consumption sugar into the continental United States. This action in 1947 of the Department further strengthens our contention.

We believe strongly that no formula should be approved which would allow selections over such an extended period as represented in the thirteen-year span proposed by the Department.

2. Past Marketings:

"Past marketings" under the Departments formula is measured by the average deliveries for the years 1935-1941. With the exception only of 1940, these were restriction years. This measure of "past marketings" is not fair and equitable in view of the limitations to which producers were subjected during these years.

Measuring "past marketings" on the basis of the last ten years (which comprise the years 1942-1947 when there was no limitation), is, in our opinion, more within the letter and spirit of the law. In taking a basic period for
298 determining "past marketings" the more recent years, the last three or the last five, or even the last ten, would be more representative.

In a spirit of liberality we are proposing the last ten years. Any previous year or any larger period is not fair or equitable.

Formula Proposed by Igualdad-Western:

We are submitting a formula [Exhibit 14] on the basis of the "ability to market" and "past marketings" as construed by us. In this formula we have set 5169 tons as the unallotted reserve for marketings of raw sugar for direct consumption, which is the amount set forth by the Department in its proposal. If our proposed formula be accepted, this unallotted reserve should be reduced on the basis of said formula and the individual allotments would then be increased accordingly.

* * * * * * * * * * *

Under this formula it is basically the same formula of the Department. The only change we have made is that we confine ability to market to the marketings in the
299 year 1947.

Also, instead of selecting the years for past marketings from 1935 to 1941, as suggested by the Department, we have selected the years 1938 to 1947 which comprise a ten-year period which we deem representative.

Under this formula Puerto Rican American would get a quota of 64,763.

Central Aguirre would get 7,197.

Guanica would get 1,000.

Igualdad-Western is 23,772.

Roig El Ejemplo is 22,350.

San Francisco is 1,248.

Camuy is 434.

This Camuy quota would probably be redistributed because they are out of business.

The total is 120,864, and as I said before, the 5,169 tons set by the Department in their formula is left there to complete a total of 126,033.

* * * * * * * * * *

300 The Witness: I am submitting a chart [Exhibit 15] showing comparative percentage marketings of direct consumption sugar by the three largest refiners (Puerto Rican American, Roig, and Igualdad-Western), during the six-year period of 1942 to 1947, inclusive.

* * * * * * * * * *

301 By Mr. Garcia-Mendez:

Q. Mr. Arellano, does this chart show the comparative deliveries in continental United States of direct consumption sugar of the three latter companies, Puerto Rican American, Igualdad-Western, and Roig? A. Yes, sir; it does.

If I may explain the chart, I will make it easier for anyone who wants to make any questions on it.

In these charts I have shown graphically the Puerto Rican American marketing for direct consumption during the years 1942 to 1947, inclusive, equally well the Igualdad-Western and Central Roig. Also the curve takes the marketings in the local market of Puerto Rico.

However, although they are not there for the purposes of these calculations, the totals taken, of course, include every other producer who either sent direct consumption

sugar to the United States or sold refined sugar in Puerto Rico.

It is apparent from this chart that Puerto Rican American did not keep up its exports of direct consumption sugar to the extent it should have. On the other hand, it
302 shows a rising curve both for Central Roig Refining Company and for Western Sugar Refining Company. In the local sales it is apparent from this chart that both Western Sugar Refining Company and Central Roig held their ground in the percentage of the total which was sold in Puerto Rico, whereas, the Puerto Rican American in order to hold its ground, it seems, disregarded the direct consumption exports because they did hold their ground in the local sales, but in order to do that apparently they disregarded keeping up their exports.

Q. The figures you have taken in making your charts for local sales, where did you obtain them? A. Out of the official records of the Association of Sugar Producers of Puerto Rico.

Q. Do you believe they are accurate to the best of your knowledge? A. To the best of my knowledge and belief. They are taken usually for other statistics.

Q. For official purposes? A. Yes.

Q. Go ahead. A. It is evident from both charts that Puerto Rican American Refinery chose to increase its local sales in preference to shipping direct consumption sugar into continental United States.

303 A schedule [Exhibit 16] is submitted showing year by year what the percentage of the deliveries of direct consumption sugar and local sales by each of the three largest companies is of the total Island production.

* * * * * * * * * * *

By Mr. Garcia-Mendez:

Q. Will you please go ahead, Mr. Arellano? A. The facts outlined above and the further fact that Igualdad-Western increased its deliveries of direct consumption sugar, especially during the difficult and critical war and postwar years,

whereas Puerto Rican American concentrated on
304 local sales, should justly operate in favor of Igualdad-Western in the acceptance of its proposed formula.

To summarize:

First: We object to the selection of random years out of a thirteen-year span to measure "ability to market." We believe that the 1948 "ability to market" should be based on the 1947 marketings.

Second: We object to the selection of the years 1935-1941 as a measure of "past marketings". We believe that a period of three, five, or at the most ten years immediately preceding 1948 is the most fair and equitable measure of "past marketings."

Third: We have accordingly submitted a formula. It follows the general form of the Department's proposal, but remedies the defects to which we vigorously object.

We request your favorable action.

305 Q. * * * In your proposed formula, you only are including the past marketings and ability to market. Will you please explain why you have done that?

* * * * * * * * * *

306 The Witness: Well, the reason for that is that we have tried to limit ourselves to the formula as suggested by the Department itself. However, I wish to make clear at this moment that if it should be so counseled by our attorneys, we will at the appropriate time request the inclusion of that, also.

By Mr. Garcia-Mendez:

Q. Do you mean to say that if under the terms of the law, it is mandatory for the Department of Agriculture to consider the proportionate share that you are requesting that your formula be amended by including proportionate shares thereof, though it be in a smaller percentage? A. Yes, sir, by all means.

* * * * * * * * * *

Cross Examination

By Mr. Antonsanti:

Q. Mr. Ramirez, you do agree, do you not, with the Department formula in so far as it selects for your refinery the year 1947 as a representative year in ability to market? A. As a representative year for ability to market?

307 Q. For ability to market, yes. A. I believe that is about the only case in which justice is done. That is the year that should be taken.

Q. That is the only thing you like about the formula, is that right? A. That is the only year that is truly representative.

Q. You like that? A. Of course, we agree with it.

Q. That happens to be the year in which you had the largest deliveries in the continental United States; is that correct? A. It happens to be so, yes.

Q. It happens to be so. You like the treatment for yourself, but you don't seem to like the same treatment for your competitors, I take it. A. On the contrary, we want the same treatment.

Q. You want the same treatment? A. We want them to take 1947, too.

Q. Would you not believe that the same treatment for your competitor is to take his highest year and not his lowest, or one of his lowest? A. Well, as a matter of courtesy.

Q. We are talking now about equity and fair dealings. A. Yes, sir.

Q. Do you believe it would be fair to take your best year and take your competitor's worst year? A. Not at

308 all, no. If there were not ruling and no precedent that the previous year be taken, of course not.

Q. Now, you did incorporate into your statement, into your written statement which you wished to submit, certain excerpts from Puetro Rico Sugar Order No. 13. Did you not read certain excerpts from that? A. What is the first part of your question, sir?

Q. In the written statement which you have submitted—
A. Yes, sir?

Q. —you have copied therein certain excerpts from Puerto Rico Sugar Order No. 13. A. Yes, sir.

* * * * * * * * * * *

310 Q. And then it follows:

"Accordingly, it is believed that the factor of refining capacity as measured by actual performance for the period stated has a greater relative importance in measuring ability to market than has the factor of current marketings." A. Yes, sir, I follow.

Q. Now, in your statement, however, although you copied parts of this excerpt, you do not seem to follow that reasoning. You take from that Sugar Order those things which are pleasing to you, but you do not follow the entire Sugar Order; is that right? A. Well, I do, sir. After talking with my counsel here on this matter, precisely that is the reason why we make this suggestion, because that was the case then, and the reason why they took that was because they had not a truly representative marketing here in which the production was above the normal allotment. Now, this 1947 was above the normal allotment. You didn't have that in 1939 or 1938 when this was made.

311 Q. But current marketings, back in 1938, meant the immediate past. Consequently, the measure of current marketings in 1938 was the immediate past; is that correct? A. It was taken, yes.

Q. Yes. Now, the immediate past current marketings now happen to fall in 1947; is that correct? A. Yes, sir.

Q. And the Sugar Order—I think this is incorporated into your statement—does use a phrase on page 3, beginning on page 3 at the bottom of the page— A. Yes, sir.

Q. "The refining capacity of processors can best be determined by actual performance for a representative period of time."

That is part of your statement?

* * * * * * * * * * *

312 A. Yes, sir.

Q. Now, I ask you if you believe the year 1947 to be a representative period? A. I do, sir.

Q. You do. Why, because you happen to have delivered during that year the largest amount? A. No, sir.

Q. Or are there other reasons? A. There are other reasons.

Q. Would you state them? A. Well, it was a year in which, although it is a fact that there was a limitation to production as fixed by the government, the limitation was made on a free year, on an unrestricted year, 1946, when everybody was free to send all he could.

Q. Was he free to produce it? A. Yes.

Q. In 1946? A. In 1946, yes, sir.

Q. If he could get the sugar? A. Why, of course.

Q. You were in the war then, weren't you, Mr. Ramírez? A. I was back, sir.

313 Q. You were back in 1946? A. Yes, sir.

Q. What years did you spend in the war? A. 1942 to about the end of 1945.

Q. About the end of 1945? A. Yes, sir, just before the—about December, 1945.

Q. I see. Then is it not true, Mr. Ramirez, that so far as your refinery is concerned, the selection of the year 1947 to gauge or measure your ability to market directly, does not concern you, but rather that you object to the formula because it selects some one else's best year, also. A. No, sir.

Q. That is not it? A. No, sir.

Q. If, in the suggested formula, the one suggested by you, you only went back ten years, it would leave out, would it not, in the computation of the formula, the best year of Puerto Rican American? A. Well, I only counted back to the last ten years, but if you call my attention to it, there is a year in which Puerto Rican American had a very large production.

Q. That was beyond that ten year period? A. Oh, that was way back, yes.

Q. How much way back? A. I think it is 13 years back.

314 Q. Thirteen years. How further back from the commencement of the war would that take us? The actual emergency. A. The war started in 1941.

Q. What is that? A. I say, the war started in 1941.

Q. The war started in Europe in 1940, didn't it, 1939? A. Yes.

Q. And how far back from there would that be? A. Four or five years, I guess.

Q. Four or five years? A. Yes.

Q. And you believe it to be fair and equitable in the allotment, 1948 allotment— A. Yes, sir.

Q. —to measure your ability to market by your best year and some one else's ability to market by taking years that were not truly representative and in which production was curtailed for the many difficulties and dislocations herein mentioned in this hearing? You believe that to be fair and equitable? A. Well, I am not acquainted with the difficulties that others had in the first place, but with regard to that, it being 1947, it just happens to be the way it should be. I suggest it because that is the way that we interpreted— believed the markets should be measured. It isn't

315 because Puerto Rican-American wouldn't reach up to what it did in 1935, you can be sure.

. . . . . .

Q. Mr. Ramirez, I note here your great liberality in your formula towards Puerto Rican-American Sugar Refinery, 64,763 tons as a proposed quota. Is that correct? That is your proposed quota for Puerto Rican-American? A. Yes, sir, that is what I would propose.

Q. Do you recall part of this hearing where the refiners met in Puerto Rico at the suggestion of the Director of the Sugar Branch to see if we could get together on the distribution of the allotment among ourselves? A. Yes, sir, I recall that.

Q. At that time, did you or any one—any one or other refiners or shippers of direct consumption sugar, suggest to Puerto Rican-American that 64,763 tons would be a nice allotment for Puerto Rican-American? A. I believe we did suggest that.

Q. You did suggest 64,000? I suggest to you that the highest you ever suggested was in the neighborhood of 61,000, and I ask you, when did you get so liberal?

316 A. Well, to tell the truth, maybe your figures didn't register very well at that time, because I more or less figured this same formula. Rather, not the formula, but an average of the years gave us more or less that total.

Q. Perhaps I can call your own figures to your mind. A. Yes, sir.

Q. Do you recall being present at a meeting of the refiners held at the Sugar Producers Association in San Juan, Puerto Rico, some time in November, or the last part of October? A. Well, I go there so often, you know—

Q. Yes. I suggest to you to look over these three papers I have here, and ask you if the figure, 62,449, 35, was not the figure that you and the other shippers of direct consumption sugar to the continental United States suggested that Puerto Rican-American might be satisfied with for the 1948 season? A. Tell me: are these the figures that we talked about over there?

Q. That is what I understood them to be. I want you to confirm that they are or that they are not. A. Well, as you will see, the basis that we had for this formula at that time was the five-year marketing period, 1943 to 1947, so therefore the figures change.

Q. But the figure is 62,000? A. Yes, I can see that.

317 Q. That is less than what you are willing to concede now; is that right? A. Yes, sir.

Q. And is it not true that this particular formula, or figures that I now show you, were one of three formulas which you suggested that Puerto Rican-American should take, and happens to be the largest allotment that you

would concede to Puerto Rican-American by virtue of the three formulas you prepared? A. I only recall that one.

Q. You do not recall. And would you please tell us what reason you have in your formula for including the great many more abnormal years than normal years. A. Well, if you will see the formula which we suggest, it comprises a period of ten years. We have to stop somewhere, you know, when we start back.

Q. I see. A. And the ten-year period is usually taken for statistics as a representative period.

Q. Taken by whom? A. Well, in all sorts of statistics. Generally, you speak in tens.

Q. Even though, in that period of ten years, there should be a very large period of abnormality, you still think
318 it should be taken for statistical purposes? A. Abnormality, sir? What kind?

Q. The war. A. Well, I think it is a representative period. It comprises some of the restricted years and it comprises some of the unrestricted years.

Q. I believe you stated that it was apparent from your graph, Exhibit No. 15, that while you held your own in the local market, Puerto Rican-American increased its local sales to the detriment of its direct consumption deliveries to the United States. A. Well, what do you—are you asking me a question?

Q. I believe you made that statement. I wonder if you wish to correct it. A. * * * If you will recall, and the record will show it, I said that both Roig and Puerto Rican-American and ourselves more or less held our ground in Puerto Rico; whereas Puerto Rican-American held their ground only there and in the direct consumption sugar all the others went up. Also, whereas Puerto Rican-American went down, and the interpretation of that is that in order to keep their ground in Puerto Rico, which was a very good market for all, they came down and disregarded
319 their direct consumption.

Q. But the graph doesn't show that, Mr. Ramirez. A. Yes, sir, it does.

Q. I call your particular attention to the year 1945, in your graph. A. Yes, sir.

Q. To 1947. A. Yes.

Q. Doesn't it show there that Puerto Rican-American was dropping off in its local sales during all that period, 1945 to 1947? A. Well, you generally interpret this as an average period, you know. You don't go from one point to the other, but if you will look at the local sales of Roig, you will see that it goes up and goes down, too, but the percentage for the period is more or less the same.

Q. Doesn't your figure here, 1945, in the graph, for Puerto Rican-American, read around 35 or 36 per cent. A. About 36 per cent.

Q. In 1945? A. It looks like that.

Q. It reads about 28 per cent in 1947? A. Yes, they lost some ground there, too, besides their consumption ground.

Q. All right. A. They didn't market in the same
320 proportion as the others.

Q. So it wouldn't be true to say that we jeopardized direct consumption deliveries to the States in order to avail ourselves of a local market, since both went down, both local sales and direct consumption deliveries in the States? A. I believe that they did jeopardize the shipments, because they could have shipped that local quota out to the States and filled up their usual quota.

Q. But the comparative lines for Puerto Rican-American in 1947, for instance, doesn't it show almost a straight line throughout the whole year for direct consumption deliveries in the United States? It does, does it not? A. Well, I didn't get your question.

Q. Doesn't your line for 1947, the direct consumption deliveries, Puerto Rican-American, show a straight line all the way through, no dropping off? A. You mean the comparison between the percentage of the total shipped in 1946 and 1947?

Q. I am asking you if the line is straight. A. The year is represented by a period there, sir. It isn't a line.

Q. There is a line drawn here through 1946-1947, up above. A. Yes, but that—

321 Q. Between 50 and 40 there is a line about one-third down. A. Yes, sir.

Q. Which is perfectly straight; is that right? A. But the line isn't what counts. It is the points.

Q. The point is the figure? A. The percentage, yes.

Q. About 46 something? A. Yes, sir.

Q. And that figure shows all the way through the year 46 per cent? A. Well, that is the average of the total for that year.

Q. But going down the graph, it shows a drop in local in percentage, doesn't it, so rather than jeopardize, in 1947, the local market—the continental market for the local market, it was the opposite, was it not? A. Well, I wouldn't say that, sir. In 1947, you sold locally 27,840 tons which was only 3,000 something tons less than you did in 1946 in Puerto Rico.

Q. I am asking you what your chart shows. A. The chart shows that same figure, represented the percentage.

Q. But the line did go down, didn't it, in 1947? A. In the local market?

Q. Yes. A. You mean that the percentage—

322 Q. Yes. A. —that Puerto Rican-American sold in the Island of Puerto Rico was less than a year before?

Q. Yes. A. I believe that there was a lot of competition there and they couldn't sell any more, sir.

Q. But it did go down? A. Yes, a little bit.

Q. It did go down. A. Yes.

Q. While your line of direct consumption deliveries to the States remains on a parallel, the percentage? A. The line in 1946 and 1947, you mean?

Q. No, 1947. A. But the percentage is represented by a period, and the line represents the comparison between 1946 and 1947 only.

Q. The two points shown, 1946 and 1947, in your line, are exactly on a level, aren't they? A. Yes, sir.

Q. At the beginning of the year and at the termination of the year. A. There is only one percentage for the whole year there.

Q. I see. A. What you probably mean is that the percentage that you sold as of the total of the Island,
323 was equal in 1946 as it was in 1947. That is true; yes, sir. Some 27,840 tons.

Mr. Quinn: In what year? The Witness: 1947, sir. Mr. Quinn: Where did you get those figures? The Witness: Well, they are the ear-tagged totals, sir.

By Mr. Antonsanti:

Q. Were these quotas interchangeable? Could Puerto Rican-American have taken its local quota and shipped it to the United States? Could it have done that? A. Taken its local quota?

Q. Yes. A. And shipped it into the United States?

Q. Yes. Of refined. Could it have done it at random or at will? A. Make an exchange of sugar?

Q. Could they have marketed that? Were they permitted to market the amount they sold in the local market? Could they sell it up here during the year 1947? A. Not during 1947, sir.

Q. No? A. No.

Q. Could you do it? A. Of course not. We were
324 limited.

Q. You were limited just as we were. A. Yes. In 1947, we were based on the 1946 unrestricted year.

Q. What was the figure you gave for our local marketing in 1947? A. I beg your pardon, sir?

Q. What was the figure you gave for our local marketings in 1947? A. It is estimated as of the day of the chart that you will be selling some 27,840.

Q. 27,000? A. 27,840 tons.

Q. Isn't the actual truth that the figure is only 22,384, and not 27,000? A. Well, sir, this quotation is ear-marked for Puerto Rican-American according to the records over in Puerto Rico.

Q. Well, what records? A. Well, you know that at the beginning of this 1947, the General Supplies Administration, which is headed by Mr. Vincente Rios, fixed a quota of refined sugar for Puerto Rico, and that was distributed in more or less figures to be determined upon the purchases that would take place from local mills of their local quotas.

So that is why we could anticipate before the year
325 was over, the amount of sugar that we would make for local consumption, and we knew in advance what you and the others would make. Everyone knew.

Q. No one was at liberty to buy whatever they wanted to, either to ship or to sell locally? You had to go to some one else to be allowed to ship? A. You had to buy local quota.

Q. You had to buy local quota? A. Yes.

Q. Do you know what the local quota assigned to Puerto Rican-American was, by Commodity? A. I don't think they got a local quota.

Q. By Vincente Rios? A. Central Mercedita got it. They didn't get any. Central Mercedita got the quota, and they bought it from Central Mercedita.

Q. What was that quota? A. I don't remember now.

Q. Do you remember it to be 8,000 tons? A. Well, it should be around that figure. Our mill was also—

Q. What quota did you get? A. Something around 6,000.

Q. 6,000? A. Yes.

326 Q. Mercedita only got 8,000? A. Yes.

Q. You were in the market much more because you purchased other people's quotas? A. No. You marketed more.

Q. No. But you were able to market more than the quota assigned to your company because you purchased some one else's quota? A. Yes, the same way as everybody else. That is, the refiners.

Q. Now, from the figures I have here, Mr. Ramirez, it would appear that you sold at a local market, 16,453 tons of direct consumption sugar in 1947; is that correct? A. From the figures that who has?

Q. That I have. A. Have I got those figures?

Q. They were read into the record yesterday. A. Oh. Well, this is the quota we purchased.

Q. 16,000? A. No, we purchased what appears here.

Q. How much is that? A. 19,568.

Q. 19,568? A. Yes.

Q. And proportionately, did you or did you not increase your local sales during the last six years referred to in your graph? A. Proportionately?

327 Q. Yes. The proportion to the total sales. A. The percentage of the total sales for the Island, as you will interpret from the chart, remains approximately the same.

Q. Let me ask you the question in another way, then: what did you market in the local market in 1939? A. I don't have that figure.

Q. You don't have it? A. I don't have it here, but I think they were read into the record yesterday.

Q. The figure that was read into the record yesterday was 4,605 tons. Would that be about right for the year 1939? A. Well, if those records are official, that would be right.

Q. And in 1947 you just stated it was 19,000 tons? A. 1947, yes, sir, about 19,000.

Q. So you increased four-fold, have you not, your local sales during that period? A. Well, the figures will indicate that, yes.

Q. Do you know the proportion increase for Puerto Rican-American? A. Well, I don't have your figure for that previous year, either.

328 Q. Well, the figures as read into the record are 7,265. A. 7,265?

Q. No. 9,256 in 1939 as compared with 22,384 in 1947. A. The indication then is that you only progressed three times while we progressed four times.

Q. I don't follow your progress. It is a little too quick for me. From nine to twenty-two is not three. A. Well,

4,600 is to 19,000 approximately four times, and you had 9,000 as compared with 22,000. In 1947?

Q. That is the figure read into the record. A. I see. What did you do with the other five?

Sir, it seems that we have increased our sales in a higher proportion in tonnage, but if you will look at the percentage of the total, it is the same.

Q. What total? A. The total. When you figure that the local sales were 100 per cent, you see. Of that percentage, as you will see, we have run from 19.5 to 18.32, to 18.77, to 19.4, to 19.85, to 19.64. That is a constant percentage. Puerto Rican-American had 26.9, 29.7, 29.5, 35.1. It shows that the local market was very promising.

Q. Keep on reading. A. 33.92 and 27.94, the last 329 year.

Q. We did go down, didn't we? A. Yes, a little.

Q. While you went up? A. Yes, sir, but you said that—I am sorry.

Q. One more question, please. A. Yes, sir.

Q. Why did you limit your chart here to five years if your formula which you suggest is ten years? A. Well, the figures for local consumption, see, were not available to us until they were read into the record yesterday. We knew ours, but we didn't know yours, nor anybody else's, way back of 1942. We couldn't find them. If we had, I would have made that chart.

Q. I see. The figures were not available to you? A. That is right.

By Mr. Quinn:

Q. Mr. Ramirez, I have one or two questions.

I think you referred to the years 1935 to 1941 in your prepared statement, and you said that with the exception of 1940, these were restrictive years; is that correct? A. Well, probably I said that, but remember, sir, that I not being a lawyer, I don't know the exact dates in which the law went in and out. However, as a business man, I can

tell you that as far as we are concerned, only 1940 -you see, it was restricted up to 1941, except that in 1940,
330 we could put in all we wanted.

Q. You used the term "restrictive". What do you mean by that? A. Well, that in all those years, with the exception of 1940—

Q. There were no restrictions? A. On the contrary.

Q. No restrictions? A. On the contrary, in 1940, we could bring in as much as we could produce, but from 1938 to 1941, with the exception of 1940, were restricted years.

Q. Didn't you go back to 1935 in your years? A. You see, then, we were not refining, in 1935.

Q. I know, but in your statement, didn't you go back to 1935 and refer to the period 1935 to 1941? A. My statement, you mean? I think I did.

Q. I don't want to burden you, but let me ask you this: were there any allocations made in 1936? A. That, I don't know, sir.

Q. Were there any allocations made in 1937? A. I don't know. I can only tell you from 1938, this way, because it is when we started our refining, in 1938.

• • • • • • • • • • • •

331 **Chester Davis** was recalled as a witness, and having been previously duly sworn, was examined and testified further as follows:

Direct Examination.

The Witness: I am Chester Davis, the Government witness.

Mr. Ramirez de Arellano made reference in his testimony to Central Camuy, and I would like to read for the record the recommendation of the Department of Agriculture with reference to one or two or three of the Centrals or Refineries who are represented here.

Mr. Presiding Officer, Central Camuy did not send a representative to this hearing to indicate its interest or ability to produce or deliver direct consumption sugar

332 mentioned in the Department's proposed allotment order.

Likewise, the data submitted for the record show that for the year 1942 to 1946 inclusive, Central Camuy did not market direct consumption sugar either in the continental United States or in Puerto Rico.

The records also show that Camuy marketed no direct consumption sugar in the continental United States during the calendar year 1947.

Therefore, the Department proposes that, irrespective of the formula ultimately adopted in arriving at a final allotment order, any allotment which would otherwise result for Central Camuy be pro rated to the other refiners. I do not know whether there are any representatives of Centrals Guanica, Aguirre, and San Francisco here, but although Centrals Guanica, Aguirre and San Francisco have not yet appeared at this hearing, data available to the Department previously made a matter of record indicates that they currently produce and deliver direct consumption sugar to the continental United States, and should therefore be given appropriate consideration in any formula ultimately adopted.

• • • • • • • • • • •

333 **Frank Philippi** was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Garcia-Mendez:

Q. Will you please state your name. A. My name is Frank Philippi.

Q. What is your occupation or your position now? A. I am a Vice President and Manager of Igualdad.

Q. How long have you been the manager of Igualdad? A. From 1934 up to now.

Q. As such manager, did you have available all the data in connection with the granting to Igualdad and Western of refining for the last year? A. Yes, I have.

334 Q. Who has been in charge of general operation in Igualdad, Western for the last year? Have you been the person in charge? A. I have.

Q. The evidence submitted by the Department of Agriculture, Mr. Philippi, shows that Igualdad had an average production for the best five consecutive days for 1947 of 227.89 tons. Is that correct? A. Yes.

Q. It is correct? A. It is correct.

Q. Would you say that that is the highest consecutive five day period of Igualdad during its history? A. No, sir. We proved 1938 a capacity of 274 tons, and we know we had still better years than that.

Q. Better than that? A. Yes.

Q. So you have a better five-day consecutive period? A. We have.

Q. Have you made any improvements in Igualdad recently, Igualdad-Western? A. We have done it and we are doing it just now.

Q. What kind of improvement are you making? A. Well, we are doubling our capacity.

Q. You mean your present capacity will be dou-

335 bled by 1948? A. By 1948, yes.

Q. When you say by 1948, you mean for the crop which is about to start in December, 1947, and end in 1948, for this coming crop? A. For the coming crop, yes.

Q. For the coming crop. Were you here while Mr. Giles testified on behalf of Puerto Rican-American? A. Yes, sir.

Q. Did you hear all his testimony? A. Yes, sir.

Q. In connection with the gasoline difficulties that he had, and the transportation difficulties, would you like to make some statemen; to the Presiding Officer? A. Well, we had also difficulties, but we get all the gasoline we need for transporting cane or sugar. Cane and sugar was an

essential product and they assigned for the operations for moving cane or sugar all the gasoline you need.

Q. What about tires? A. Also tires.

Q. How far east is Igualdad Western from the Mayaguez port? A. About 9 kilometers.

Q. About 9 kilometers. Is that the port where you sent your sugar to the continental United States? A.
336 Yes, sir, the only port.

Q. Did you have any Army camp or Army airport close to your refinery? A. Yes. About two or three kilometers from Igualdad Western. It is an airport which belonged to the Army during the war.

Q. Were there regulations as to the use of lights by the trucks that you used in hauling your sugar? A. Well, we have the same regulations that any one had on the Island.

Q. Including the black-outs, too? A. Sure.

Q. Could you overcome them? A. Yes, sir.

Q. Was it difficult to overcome all those regulations? A. Well—

Q. I mean, to comply with them and still be in production. A. It was difficult but we overcame all the difficulties.

Q. During this war period, did you increase your warehouse capacity? A. Yes, sir, we increased it in 1941.

Q. And how much did you increase your warehouse in capacity? A. Well, we put up two warehouses. One 60,000 bags capacity, and another 40,000 bags. Bags of
337 250 pounds.

Q. 250 pounds each? A. Yes.

Q. 60,000 bags. That means 7.5. 75,000 tons? A. Yes.

Q. And the other one was what? A. 50. The other one was 50. That means 100,000 bags of 250 pounds each, which means 12,500 tons.

Q. How could you build those warehouses in spot of the war? Did you get any— A. Yes.

. . . . . .

Q. When did you build those warehouses? A. We started in 1941 and finished later on.

Q. When did you finish them? A. Well, in 1942.

Q. During the construction of those warehouses, did the wartime regulations come in? Were they applicable

338 Q. During this wartime period, did you also rent then? A. Well, it was applicable to every one.

additional warehouses? A. Yes, sir.

Q. In connection with the shipping of your sugar, did you have to apply to the War Maritime Commission? A. Everyone had to do it.

Q. Everyone. Did you eventually get shipping space? A. Yes, sir.

Q. Isn't it your recollection that every one got the shipping space in Puerto Rico? A. Well, I think so.

* * * * * * * * * *

Cross Examination

By Mr. Antonsanti:

Q. Are you familiar with the conditions in the port of Ponce during the war years? A. No, sir.

Q. You were not? A. No, sir.

Q. You are merely stating what the conditions

339 were on the Port of Mayaguez, from where you shipped? A. Yes.

Q. These warehouses which you speak of, they were already in the process of construction at the time that the war intervened; is that right? A. Yes, that is right.

Q. And you were allowed to continue what you had already started? A. Yes, sir.

Q. You had already purchased all your materials? A. I don't know about all. Part of it we had purchased, yes.

Q. How far along was your construction when December 7, 1941 set in? A. I beg your pardon?

Q. How far was your construction along of the warehouses when the war set in? A. That is hard to answer.

Q. Well, was your building 50 per cent complete, 75 per cent, or only 10 per cent? A. I can't remember that.

Q. You can't remember? A. No.

Q. When did you start construction? A. It must be in the last part of 1941. I remember that at Pearl Har-
340 bor, we were about starting building those warehouses.

Q. I see. You completed them during 1942? A. Yes.

Q. Were those warehouses elaborate buildings or very plain buildings? A. No, very plain buildings.

Q. What kind of buildings were they? What were they made of? A. Wood.

Q. Wooden buildings? A. Wood and frame, because we couldn't get steel. And corrugated iron.

Q. So it was a frame building made of wood? A. Yes.

Q. Covered with a zinc roofing; is that it? A. That is correct.

Q. And when your refinery—when you first entered the refining market, there was already a ceiling of the amount of refined sugar that could be introduced into the United States, was there not? A. When we—

Q. When did you first enter the refining business? A. 1938.

Q. 1938? A. Yes.

341 Q. There was already the Jones-Costigan Act on the statute books; is that right, and the 1937 Sugar Act was also already in force, limiting the supply of sugar that could be brought into the United States? A. Yes.

Q. So you entered business with full knowledge that introduction of direct consumption sugar in the United States was limited, did you not? A. I don't know if when we started, or when we were considering in putting in the orders—the refined sugar was limited. I can't recall that.

Q. I mean, the introduction into the United States of refined sugar was limited at the time that you decided to enter this new phase of the industry; is that right? A. Well, when we entered or started refining sugar, that was limited, yes.

. . . . . .

By Mr. Quinn:

Q. Mr. Philippi, you are manager of the refinery, you testified? A. Manager of Igualdad and affiliates.

342 Q. And you testified that the refinery is presently doubling its capacity? A. Yes, sir.

Q. Is this being done on your recommendations? A. Well,—

Q. As manager of the refinery? A. It is made under the decision of the directors.

* * * * * * * * * * *

Q. You are doubling your capacity, though? A. Yes, sir.

Q. Do you know that there is a Federal law restricting the amount of refined sugar you can market in the continental United States for the next five years? A. Yes, we know that.

Q. You are fully aware of that? A. Sure.

Q. In doubling your capacity, where do you expect

343 to market the sugar you will refine? A. In the same places we are doing it now.

Q. In the continental United States? A. In the same places we are doing it now.

Q. And Puerto Rico? A. Puerto Rico and the continental United States.

Q. Where do you expect to get the permission to market the refined sugar your increased capacity will give you? A. Where do we?

Q. Where do you expect to get the permission to market the refined sugar your increased capacity will give you? A. We will ship the quota we get, and we will sell whatever we can get out of the Puerto Rican market.

Q. Where do you expect to get the permission to market the refined sugar that the increased capacity of your refinery will give you? In the continental United States? Where do you expect to get that permission? A. The quota we will get, that is what we will ship.

* * * * * * * * * * *

Redirect Examination

By Mr. Garcia-Mendez:

Q. Do you plan to subscribe for a congressional amendment to the law regarding the sugar that is to be shipped into the continental market, too? A. We are doing it.

344

Q. You have tried that before, too? A. Yes, sir.

Recross Examination

By Mr. Quinn:

Q. One question, Mr. Philippi. Has Igualdad ever petitioned Congress to amend the law for an increased amount of direct consumption sugar that is allowed to come up here from Puerto Rico? A. Wherever we had opportunity to speak to Senators or Congressmen of the United States, we have done it. Through all other ways we have done it.

Q. Did Igualdad appear at any of the congressional hearings when any of these laws were being considered? A. No, we haven't.

Q. Did you appear in 1940? A. No, sir.

Q. Did you appear in 1947 when the 1948 Sugar Act was being considered? A. No, sir.

* * * * * * * * * *

345 By Mr. Garcia-Mendez:

Q. Isn't it a fact, Mr. Philippi, that all sugar producers in Puerto Rico, finally accepted the 1947 Sugar Act as the best that could be obtained under the circumstances at the present moment, but without renouncing the right of further trying to increase the * * * amount of direct consumption sugar that could be brought into the United States?

* * * * * * * * * *

347 Presiding Officer Gifford: Do you have such knowledge as that?

The Witness: I have such knowledge. It is true.

* * * * * * * * * *

Recross Examination

By Mr. Antonsanti:

Q. Mr. Philippi, when you say that the opinion of all sugar producers in Puerto Rico was one of conformity with the 1947 Sugar Act, are you prepared to state that you represent all sugar producers in Puerto Rico in that opinion? A. No, sir.

Q. You do not represent Puerto Rican-American Sugar Refinery? A. No, sir.

Q. Do you know the views of the Puerto Rican-American Sugar Refinery? A. I believe so, if I am not wrong, that you stated that you went to the Congress and asked
348 for eliminating the refined sugar quota.

Q. Then that would indicate that you answer to the question propounded to you by Mr. Garcia-Mendez is not correct; would it not? A. Why?

Q. Because you stated that the opinion of all sugar producers in Puerto Rico was one of conformity with the 1948 Act. Now, I ask you if that opinion is shared by one of the largest refining producers in Puerto Rico. A. Yes.

Q. Do you know whether that opinion is shared by Puerto Rican-American Sugar Refinery, is in conformity with the 1948 quotas?

* * * * * * * * * *

Q. Then your statement is not entirely correct. If one member of the sugar producers of Puerto Rico—not the Association, but one member of the collective body of producers was not in conformity with the Act, the 1948
349 Act, your statement would not be correct? A. Well, the law was accepted because there were no other alternatives for Puerto Rico.

Q. Do you know whether or not Puerto Rican-American objected? A. I beg your pardon?

Q. Do you know whether or not Puerto Rican-American objected at the congressional hearings? A. No. I don't know it of my own knowledge.

* * * * * * * * * *

386 **EXHIBITS**

Exhibit No. 1

[7 CFR, Part 821]

DIRECT CONSUMPTION PORTION OF 1948 SUGAR QUOTA FOR PUERTO RICO

NOTICE OF HEARING ON PROPOSED ALLOTMENT

Pursuant to the authority contained in section 205 (a) of the Sugar Act of 1937 (7 U. S. C. 1115 (a)), as amended, extended and re-enacted, particularly by the Sugar Act of 1948 (Pub. Law 388, 80th Cong.), and in accordance with the applicable rules of practice and procedure, as amended (7 CFR 801.20 et seq.), and on the basis of information before me, I, Clinton P. Anderson, Secretary of Agriculture, do hereby find that the allotment of that portion of the 1948 sugar quota for Puerto Rico for consumption in the continental United States which may be filled by direct consumption sugar, pursuant to section 207 (b) of the said act, is necessary to prevent disorderly marketing and importation of such sugar from Puerto Rico and to afford all interested persons an equitable opportunity to market such sugar in the continental United States, and hereby give notice that a public hearing will be held at Washington, D. C., in Room 5085, South Building, United States Department of Agriculture, on December 18, 1947, at 10:00 a.m.

The purpose of such hearings is to receive evidence to enable the Secretary of Agriculture to make a fair, efficient, and equitable distribution of the above-mentioned portion of the 1948 sugar quota for Puerto Rico among persons who bring such sugar into the continental United States.

The Department proposes to allot the 126,033 short tons of sugar, raw value, representing the direct consumption portion of the 1948 quota for Puerto Rico, on the basis of "past marketings" and "ability to market" such sugar, as provided in section 205 (a) of the said act. Equal

weight is given to each of the bases set forth above. It is proposed to measure "past marketings" by using each refiner's average deliveries of such sugar during the period 1935-1941. It is proposed to measure "ability to market" on the basis of the highest one year delivery of direct consumption sugar to the continental United States by each refiner during the calendar years 1935-1947, inclusive. On the basis of information presently available to the Department, the application of the proposed formula will result in allotments as follows:

Name of processor:	*Direct-consumption allotment (short tons, raw value)*
Porto Rico American Sugar Refinery	79,783
Central Aguirre	5,222
Central Guanica	2,848
Central Igualdad	14,026
Central Roig	15,446
Central San Francisco	1,694
Central Camuy	1,845
Unallotted reserve for marketings of raw sugar for direct consumption	5,169
Total	126,033

The basic data used in computing the foregoing allotments are set forth in Exhibits A and B, which are made a part of this proposal and published herewith.

Copies of the foregoing proposal may be obtained from the Hearing Clerk, United States Department of Agriculture, Washington, D. C., or may be examined in the office of the Hearing Clerk.

Issued this 4th day of December 1947.

[SEAL] CLINTON P. ANDERSON,
Secretary of Agriculture.

EXHIBIT A

ENTRIES OF PUERTO RICAN DIRECT CONSUMPTION SUGAR, BY MILLS 1935-47 [1]

[Short tons, raw value]

Mill	1935	1936	1937	1938	1939	1940	1941	1942	1943	1944	1945	1946	1947 [2]
Puerto Rican American Refinery	116,611	109,945	97,498	95,756	99,041	102,401	79,237	55,888	66,706	[4] 47,792	56,566	57,141	60,820
Aguirre	2,719	2,496	5,767	3,443	1,170	5,562	3,534	1,591	689	0	3,929	10,640	10,654
Roig El Ejemplo & Roig	—	2,778	16,204	12,379	18,000	28,657	15,028	14,543	15,777	13,483	16,863	[5] 24,414	27,246
Guanica	1,015	—	—	3,905	4,982	4,648	4,668	2	4,...	—	—	—	—
Igualdad-Western	163	438	52	5,774	11,847	25,598	13,017	17,365	17,765	14,632	24,655	27,767	29,965
Comp. Azucarera del Camuy, Inc.; Soller y Rio Llano	—	—	—	—	2,559	2,592	3,742	—	—	—	—	—	—
San Francisco	2,463	2,590	1,981	1,806	1,688	1,773	1,767	1,749	296	0	64	1,324	1,378
Total refined and turbinado	122,971	118,247	121,502	123,123	139,287	171,231	120,993	91,138	105,544	75,907	102,077	121,286	—
Raws for D. C. in continental United States [6] [7]	4,523	8,333	4,543	200	9,736	3,752	5,099	4,936	2,045	2,259	6,823	167	—
Total	127,494	126,580	126,045	123,323	149,023	174,983	162,092 [a]	96,074	107,589	78,166	108,900	121,543 [b]	130,063

[1] Refined and turbinado only shown by mills.
[2] Successor to Igualdad 1943.
[3] Includes 1,307 short tons of 1946 crop sugar entered Jan. 4, 1947.
[4] Includes 6,622 short tons turbinado sugar shipped by Mercedita.
[5] Allotments as made pursuant to terms of Commodity Credit Corp. purchase contract.
[6] 12-year average deliveries equal 4,368 short tons, raw value.
[7] 7-year (1935-41) average deliveries equal 5,169 short tons, raw value.
[a] Should read 126,092, see p. 38 supra.
[b] Should read 121,453, see p. 38 supra.

Source: Official statistics Sugar Branch, P. M. A., U. S. Department of Agriculture.

EXHIBIT B

PROPOSED FORMULA FOR ALLOTTING THE 1948 PUERTO RICAN DIRECT CONSUMPTION QUOTA OF 126,033 SHORT TONS, RAW VALUE

Refinery (1)	Ability to market 50% weight: Highest 1 year marketings in 13 years 1935 to 1947, inclusive — Short tons (2)	Ability to market 50% weight: Highest 1 year marketings in 13 years 1935 to 1947, inclusive — Raw value (3)	Past marketings 50% weight: Average deliveries 1935-41 Short tons of sugar, raw value (4)	Column 3+4÷2 (5)	Multiply column 5×6 (6)	Individual refinery allotment 120,864 short tons, raw value (7)
Puerto Rican American Sugar Refinery	1935	116,611	100,070	108,340	.73640983	79,783
Central Aguirre	1947	[1] 10,654	3,527	7,091	.73640983	5,222
Central Guanica	1939	4,982	2,754	3,868	.73640983	2,848
Central Igualdad-Western	1947	[1] 29,965	8,127	19,046	.73640983	14,026
Central Roig-El Ejemplo	1940	28,657	13,292	20,975	.73640983	15,446
Central San Francisco	1936	2,590	2,010	2,300	.73640983	1,694
Compania Azucarera del Camuy	1941	3,742	1,270	2,506	.73640983	1,845
Total		197,201	131,050	164,126		120,864
Unallotted reserve for marketing of raw sugar for direct consumption in the United States—average 1935-41						5,169
Total 1948 allotment						126,033

[1] These figures subject to revision when final 1947 outturn weight and polarization officials determined.

[F. R. Doc. 47-10776; Filed, Dec. 5, 1947; 8:52 a.m.]

401 **Exhibit No. 3**

DESIGNATION OF REPRESENTATIVE OF THE DEPARTMENT AT THE HEARING WITH RESPECT TO THE ALLOTMENT OF THE DIRECT CONSUMPTION PORTION OF THE 1948 SUGAR QUOTA FOR PUERTO RICO

Pursuant to Section 801.27(b)(1)(i) of the regulations governing allotments of sugar quotas (12 F.R. 8226), I hereby designate Chester E. Davis of the Sugar Branch of the Production and Marketing Administration to represent the Department of Agriculture at the hearing to be held December 18, 1947, with respect to the allotment of the direct consumption portion of the 1948 sugar quota for Puerto Rico.

JAMES H. MARSHALL,
Director, Sugar Branch

402 **Exhibit No. 4.**

REFINERY CAPACITY—PUERTO RICO FROM SURVEY BY SAN JUAN OFFICE OF P.M.A. OCTOBER 13, 1947 [1]

Name of Refinery	Average Production of Best 5 Consecutive Days Tons	Annual Average Run [2]	Total Capacity Short Tons	Production Period on Which Data in Column 2 Are Based
Puerto Rico-American	656.40	300	196,920	Feb. 12 to 16, 1947
Aguirre	242.80	125	30,350	May 6 to 10, 1947
Guanica	176.32	300	52,896	March 11 to 15, 1947
Igualdad	227.89	300	68,367	April 21 to 25, 1947
Roig	368.52	300	110,556	March 29 to April 2, 1947
San Francisco	25.61	125	3,201	March 26 to 30, 1947
Camuy [2]	75.64	300	22,692	——
Total	——	—	484,982	

[1] No data received from Central Camuy on 1947 rate of production.

[2] Capacity data shown in Puerto Rican Sugar Order No. 13 of January 5, 1939.

[3] 300 day basis for mills manufacturing refined sugar and 125 day basis for mills manufacturing washed or turbinado sugar.

404 **Exhibit No. 6**

DELIVERIES OF REFINED AND TURBINADO SUGAR FOR LOCAL CONSUMPTION IN PUERTO RICO BY CERTAIN MILLS, JANUARY 1-NOVEMBER 29, 1947 (Short tons, 96° basis)

Mill	*1947*
Puerto Rican	
American Sugar Refinery, Inc.	22,384
Aguirre	30
Roig Refining Company	16,675
Guanica	14,817
Western Sugar Refining Co.	16,453
San Francisco	58
Total	70,417

SOURCE: Report from Caribbean Area Office, U.S.D.A., P.M.A. in San Juan, P. R.

405 **Exhibit No. 7**

(Exhibit 21 from Hearings on Revision of Sugar Order No. 10 Allotment of 1938 Puerto Rican Sugar Quota and Allotment of Local Consumption Quota Held May 4, 1938)

Deliveries of Sugar to Local Consumption by Puerto Rican Processors During 1935 (Includes Raws)

Mill	Amount Delivered
Aguirre	8,090
Boca Chica	
Cambalache	2,437
Canovanas	1,882
Caribe	631
Carmen	1,057
Coloso	1,461
Constancia-Ponce	
Constancia-Toa	1,533
Eastern Sugar	5,845
El Ejemplo	976
Eureka	774
Fajardo	332
Guamani	612
Guanica	11,528
Hermina	82
Igualdad	836
Juanita	866
Lafayette	806
Mercedita	
Monserrate	820
Pellejas	38
Plata	997
Playa Grande	243
Plazuela	2,066
Rochelaise	743
Roig	1,717
Rufina	10
San Francisco	645
San Vicente	1,792
Santa Barbara	173
Soller	304
Vannina	1,041
Victoria	1,112
P. R. Am. Ref.	6,649
Total	58,098

All figures in tons of 2,000 pounds, sugar, in terms of commercial weight.

Data obtained from the records of the Sugar Section, Agricultural Adjustment Administration, San Juan, Puerto Rico.

Exhibit No. 8

(Exhibit 21 from Hearings on Revision of Sugar Order No. 10 Allotment of 1938 Puerto Rican Sugar Quota and Allotment of Local Consumption Quota Held May 4, 1938)

DELIVERIES OF SUGAR TO LOCAL CONSUMPTION BY PUERTO RICAN PROCESSORS DURING 1936 (Includes Raws)

Mill	*Amount Delivered*
Aguirre	7,010
Boca Chica	
Cambalache	2,558
Canovanas	3,979
Caribe	421
Carmen	1,114
Coloso	3,536
Constancia-Ponce	
Constancia-Toa	1,474
Eastern Sugar Associates	5,686
El Ejemplo	227
Eureka	902
Fajardo	221
Guamani	968
Guanica	12,269
Hermina	114
Igualdad	674
Juanita	558
Lafayette	560
Mercedita	
Monserrate	141
Pellejas	137
Plata	1,036
Playa Grande	200
Plazuela	3,053
Rochelaise	796
Roig	3,372
Rufina	359
San Francisco	391
San Vicente	2,241
Santa Barbara	220
Soller	368
Vannina	1,396
Victoria	1,232
P. R. Am. Ref.	9,105
Total	66,318

All figures in tons of 2,000 pounds, sugar, in terms of commercial weight.

Data obtained from the records of the Sugar Section, Agricultural Adjustment Administration, San Juan, Puerto Rico.

407 **Exhibit No. 9**

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURAL ADJUSTMENT ADMINISTRATION

WASHINGTON, D. C.

(Puerto Rico Sugar Order No. 3)

ALLOTMENT OF QUOTA FOR DIRECT CONSUMPTION SUGAR FOR PUERTO RICO

ORDER MADE BY THE SECRETARY OF AGRICULTURE UNDER THE AGRICULTURAL ADJUSTMENT ACT

UNITED STATES DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY.

By virtue of the authority vested in the Secretary of Agriculture by the Agricultural Adjustment Act, approved May 12, 1933, (hereinafter called the "Act"), as amended, I, R. G. Tugwell, Acting Secretary of Agriculture, having due regard to the welfare of domestic producers, and to the protection of the domestic consumers and to a just relation between the prices received by domestic producers and the prices paid by domestic consumers, in order to effectuate the declared policy of the said Act, and upon the basis of the findings hereinafter set forth, do hereby make, issue, publish and give public notice of the orders hereinafter set forth with the force and effect of law, to be in force and effect until amended or superseded by orders or regulations hereafter made by the Secretary of Agriculture:

ARTICLE I—FINDINGS

By virtue of the foregoing authority, and being fully advised in the premises, I, R. G. Tugwell, Acting Secretary of Agriculture, do hereby make the following findings:

1. That pursuant to the provisions of section 8a (1) (A) (ii) of the Act, the Secretary of Agriculture, in General Sugar Quota Regulations, Series 2, executed on January 5, 1935, has determined that of the years 1931, 1932, and 1933, the greatest quantity of direct consumption sugar brought into or imported into continental United States for consumption, or which was actually consumed therein, from Puerto Rico was during the year 1933, which quantity was 133,119 short tons, raw value.

2. That of the said total of 133,119 short tons of direct consumption sugar brought into or imported into continental United States from Puerto Rico during 1933, 123,529 short tons, raw value, consisted of refined sugar, and
408 9,590 short tons, raw value, consisted of sugar which was not refined. (As used in this Order, the term "refined sugar" means any sugar manufactured in Puerto Rico by a recognized remelting and recrystallization refining process, except those sugars commonly known in the sugar trade as turbinado sugars.)

3. That during the year 1933, the only persons producing for shipment to continental United States for consumption therein refined sugar from Puerto Rico as direct consumption sugar were the Porto Rican American Sugar Refining Company and the South Porto Rico Sugar Company of Puerto Rico, which companies have agreed with each other and with the Secretary of Agriculture that the percentages of such sugar imported by each of said companies for the purposes of this Order, were 95.70% and 4.30% respectively.

ARTICLE II—ORDERS

On the basis of the foregoing findings, and pursuant to the authority vested in the Secretary of Agriculture as aforesaid, it is hereby ordered:

1. Of the quota of 133,119 short tons, raw value, of Puerto Rico direct consumption sugar which may be transported to, received in, or marketed in continental United States during the calendar year 1935, a quantity not exceeding 9590 short tons, raw value, may be transported to, received in, or marketed in continental United States other than as refined sugar as hereinabove defined; and a quantity not exceeding 123,529 short tons, raw value, may be transported to, received in, or marketed in continental United States as refined sugar, as hereinabove defined.

2. That the quantity of refined sugar which may be transported to, received in, or marketed in continental United States for direct consumption therein during the calendar year 1935, as fixed pursuant to section 1 of this Order, is hereby allotted as follows:

(a) To Porto Rico American Sugar Refining Company, 118,217 short tons, raw value;

(b) To South Porto Rico Sugar Company of Puerto Rico, 5,312 short tons, raw value.

3. Notwithstanding the provisions of this Order, no direct consumption sugar shall be transported to or received in continental United States for consumption therein unless such sugar is identified as being within a marketing allotment under the provisions of Puerto Rico Sugar Order No. 2, executed by the Secretary of Agriculture on February 23, 1935, and unless such sugar has been processed and/or is being marketed in accordance with all the provisions of said Order.

4. No person shall, during the calendar year 1935:

(a) Buy, sell, or transport to or market in continental United States for consumption therein, direct consumption sugar from Puerto Rico other than refined sugar, unless the Secretary shall determine that such sugar, together with all amounts theretofore received in continental United

States is not in excess of 9,590 short tons, raw value, and complies with all the provisions of this Order;

(b) Buy, sell, or transport to, or market in continental United States for consumption therein, direct consumption sugar from Puerto Rico in the form of refined sugar in excess of the allotment given to him under this Order, and unless the Secretary determines that the quantity so transported or received is within such allotment and is in accordance with the provisions of this Order.

5. Whenever any person considers himself aggrieved because of any allotment heretofore made to him or to any other person, or because he has received no allotment, or because of any provision of this Order, he may make application in writing, under oath, to the Secretary for the adjustment of such allotment theretofore made, or for an allotment or for the modification of such provision of this Order, which application shall fully set forth reasons therefor and data in support thereof. Such person shall be entitled to due notice and opportunity for hearing with respect to such application, if on the basis of such application and supporting data, the Secretary determines that the facts therein contained present a reasonable basis and cause for hearing. Any such hearing shall be held pursuant to applicable regulations issued by the Secretary. The Secretary of Agriculture may, to effect the purposes of section 8a (1) of the Act, after such hearing, grant or deny, in whole or in part, such application and accordingly adjust, revoke, or grant the allotment, or modify the provision of this Order which is involved.

6. If any provision of this Order is declared invalid, or the applicability thereof to any person, circumstance, or thing is held invalid, the validity of such provision and/or of the remainder of this Order and/or the applicability thereof to any other person, circumstance or thing shall not be affected thereby.

7. The Secretary may by designation in writing, name any person, including any officer or employee of the Government, or name any bureau or division in the Department of Agriculture, to act as his agent or agency in connection with any of the powers provided in this Order to be exercised by the Secretary.

In testimony whereof, R. G. Tugwell, Acting Secretary of Agriculture, has issued this Order and has hereunto set his hand and caused the official seal of the Department of Agriculture to be affixed in the City of Washington, District of Columbia, this 2nd day of April 1935.

R. G. TUGWELL,
Acting Secretary of Agriculture.

410 **Exhibit No. 10**

UNITED STATES DEPARTMENT OF AGRICULTURE
PRODUCTION AND MARKETING ADMIN.
SUGAR BRANCH
WASHINGTON 25, D. C.

June 10, 1947

Mr. Arthur L. Quinn
Counsellor at Law
726 Jackson Place, N.W.
Washington, D. C.

Dear Mr. Quinn:

This is in reply to your letter of May 26, 1947, in which you request that we reconsider our decision with respect to the quantity of 1946-47 crop Puerto Rican raw sugar Commodity Credit Corporation will approve for release to the Porto Rican American Sugar Refinery, Inc. for the manufacture of direct consumption sugar for shipment to the United States. After carefully considering your request, this is to inform you that we are unable to change our decision with respect to this matter.

As you are aware, it has been the policy of the Department of Agriculture since the inception of wartime controls

to exercise such controls in such manner as not to disturb the prewar competitive positions of the various segments of the sugar industry. This policy was adopted as we believe that when controls are removed the various segments of the industry should, insofar as possible, occupy the same relative positions as they occupied prior to such controls. Although the quota provisions of the Sugar Act of 1937, as amended, have been suspended since April 14, 1942, the shortage of sugar has made it necessary for us to exercise allocation controls over refiners. The quotas contained in the Act were established by legislative action, and we feel that, as long as we are exercising allocation controls, any change in these quotas should be made by the legislative branch after giving all segments of the industry an opportunity to present their case with respect to the quota provisions of the Act. We would like to point out that since the suspension of the quota provisions of the Act in 1942, the total amount of direct consumption quota established in the Act for the calendar year 1941 of 126,033 short tons.

The possibility of permitting larger shipments of direct consumption sugar from Puerto Rico to the continental United States, provided Commodity Credit Corporation was given control over the shipment and distribution of such sugar, was also given careful consideration. It was decided, however, that the adoption of such a program at this time would not be consistent with the above-mentioned policy during the period of allocation control.

Very truly yours,

(s) JAMES H. MARSHALL,
Director.

423 CHAPTER VIII—PRODUCTION AND MARKETING ADMINISTRATION (SUGAR BRANCH)

[Puerto Rico Sugar Order 18]

PART 821—SUGAR QUOTAS

Decision and Order of Secretary of Agriculture Allotting Direct-Consumption Portion of 1948 Sugar Quota for Puerto Rico

Basis and purpose. This allotment order is issued under section 205 (a) of the Sugar Act of 1948 (hereinafter called "act"), for the purpose of allotting the direct-consumption portion of the 1948 sugar quota for Puerto Rico among persons who market such sugar in the continental United States. The basis and purpose of the order are more fully explained below.

Omission of recommended decision and effective date. The record of the hearing shows that the capacity of Puerto Rican refineries to produce direct-consumption sugar far exceeds the 126,033 short tons of such sugar which may be marketed in the continental United States under the act and the quantity of such sugar which is distributed annually for local consumption in Puerto Rico (R. 17-18). The proceeding to which this order relates was instituted for the purpose of making allotments so as to prevent disorderly marketing and to afford all interested persons an equitable opportunity to market direct-consumption sugar in the continental United States (Ex. 1). Such proceeding could not be instituted earlier than December 1947, for the reason that the statute under which it was authorized was suspended by Presidential proclamation (R. 255). Some of the allotments made by this order are small and could be exceeded by single shipments of sugar. It is imperative that this order become effective at the earliest possible date in order fully to effectuate the purposes of section 205 (a) of the act. Accordingly, it is hereby found that due and timely execution of the functions

imposed upon the Secretary under the act, imperatively and unavoidably requires the omission of a recommended decision in this proceeding. It is hereby further found that compliance with the 30-day effective date requirement of the Administrative Procedure Act (60 Stat. 237) is impracticable and contrary to the public interest and, consequently, this order shall be effective when published in the Federal Register.

Preliminary statement. Section 207 (b) of the act provides that not more than 126,033 short tons, raw value, of the sugar quota for Puerto Rico for any calendar year may be filled by direct-consumption sugar.

Under the provisions of section 205 (a) of the act, the Secretary is required to allot a quota or proration thereof whenever he finds that the allotment is necessary (1) to assure an orderly and adequate flow of sugar or liquid sugar in the channels of interstate commerce, (2) to prevent the disorderly marketing of sugar or liquid sugar, (3) to maintain a continuous and stable supply of sugar or liquid sugar, or (4) to afford all interested persons an equitable opportunity to market sugar or liquid sugar within the quota for the area. Section 205 (a) also provides that such allotment shall be made after such hearing and upon such notice as the Secretary may by regulation prescribe.

On December 6, 1947, the Secretary, pursuant to the applicable rules of practice and procedure (7 CFR 801.20, et seq.; amended by General Sugar Regulations, Series 3, No. 1, 12 F. R. 8225, 13 F. R. 127, 131), issued a notice of a public hearing to be held in Washington, D. C., on December 18, 1947, for the purpose of receiving evidence to enable him to make a fair, efficient, and equitable distribution of the portion of the 1948 sugar quota for Puerto Rico for consumption in the continental United States which may be filled by direct-consumption sugar. The notice of the hearing contained a proposed allotment formula and the allotment which each interested person would receive under that proposal.

Section 205 (a) of the act requires a preliminary finding by the Secretary as a condition precedent to the calling of a hearing. The notice of hearing issued by the Secretary on December 6, 1947, provides in part as follows:

Pursuant to the authority contained in section 205 (a) of the Sugar Act of 1937 (7 U. S. C. 115 (a)), as amended, extended and re-enacted, particularly by the Sugar Act of 1948 (Pub. Law 388, 80th Cong.), and in accordance with the applicable rules of practice and procedure, as amended (7 CFR, 801.20 et seq.); and on the basis of information before me, I, Clinton P. Anderson, Secretary of Agriculture, do hereby find that the allotment of that portion of the 1948 sugar quota for Puerto Rico for consumption in the continental United States which may be filled by direct consumption sugar, pursuant to section 207 (b) of the said act, is necessary to prevent disorderly marketing and importation of such sugar from Puerto Rico and to afford all interested persons an equitable opportunity to market such sugar in the continental United States, and hereby give notice that a public hearing will be held at Washington, D. C., in Room 5085, South Building, United States Department of Agriculture, on December 18, 1947, at 10:00 a.m.

The hearing was held at Washington, D. C., on the date specified in the notice.

On the question of necessity for making allotments, the Government witness testified that on the basis of actual performance for representative periods the potential capacity of Puerto Rican refineries to produce direct-consumption sugar approximates 485,000 short tons of such sugar per year (R. 17-18; Ex. 4). Although from 75,000 to 90,000 short tons of direct-consumption sugar are distributed annually for local consumption in Puerto Rico, this amount, together with the 126,033 short tons of such sugar which may be marketed in the continental United States, is well below the capacity of Puerto Rican refineries to produce such sugar (R. 18). The Government witness then stated that in view of this situation, allotments are neces-

sary to prevent disorderly marketing and to assure each refiner his fair share of the continental market for Puerto Rican direct-consumption sugar (R. 19). The testimony of the Government witness on the question of the necessity for allotments in 1948 was not controverted by any witness.

In regard to the manner in which the allotments should be made, the Government witness testified that one of the standards contained in section 205 (a) of the act, namely, proceedings from sugarcane to which proportionate shares (established under section 302 (b) of the act) pertained, is inapplicable because (1) the great majority of the sugar mills in Puerto Rico which process sugarcane into raw sugar do not produce refined sugar, which constitutes the bulk of the direct-consumption sugar, and (2) some of the refiners of direct-consumption sugar in Puerto Rico do not obtain their raw sugar supplies by processing "proportionate shares" sugarcane, but instead purchase their raw sugar from raw sugar mills (R. 19, and Puerto Rico Sugar Order No. 13, R. 255). The witness concluded that the use of this standard would not result in fair, efficient, and equitable allotments and proposed that the allotments be made on the basis of equal weight to "past marketings" and "ability to market" (R. 21-22). The witness then proposed that past marketings be measured by each refiner's average shipments of direct-consumption sugar to the continental United States during the years 1935-1941, inclusive, and that ability to market be measured by the highest single year's marketings of direct-consumption sugar in the continental United States by each refiner during the years 1935-1947, inclusive (R. 20). As to the measure of ability, the Government witness stated that marketings rather than plant capacity should be used because they afforded a better measure of ability than plant capacity (R. 22, 67), and that the best year's performance during the past 13 years had been selected rather than "current" marketings because this period covered both "free" and restricted years and was deemed a period during which

all the interested parties and adequate opportunity to demonstrate ability (R. 23). The witness stated that a recent investigation in Puerto Rico showed that the present plant capacity of each refiner is well above the marketings for the year selected to measure ability to market (R. 46-47, 68-69; Ex. 4). The period for measuring ability to market was not limited to 1947 or other war or post-war year because of wartime dislocations, some of which extended into the calendar year 1947 (R. 40-43, 69-70, 255-257). The witness stated further that, although marketings during a period of wartime restrictions and dislocations would not alone constitute a fair measure of ability to market,
424 nevertheless demonstrated ability during those years should not be ignored and, accordingly, the period for measuring ability included both war and pre-war years (R. 67-68). As to the measure of past marketings, the Government witness testified that because of the wartime shipping difficulties, Government procurement restrictions, and other wartime dislocations, the war and post-war years were deemed to be unrepresentative of past marketings and were, therefore, excluded (R. 24). The period 1935-1941, inclusive, was considered to be a more normal or representative period and should be used (R. 53). The witness also recommended that 5,169 short tons of sugar be held as an unalloted reserve for persons who bring raw sugar into the continental United States for direct-consumption purposes. The recommended amount is equal to the average quantity of such sugar brought into the States during the years 1935-1941, inclusive (R. Ex. 1).

The witness for Puerto Rican American Sugar Refinery (herein called "Puerto Rican American") made no specific proposal regarding the manner in which the allotment should be made. The testimony of Puerto Rican American was directed primarily to the difficulties experienced by that company during the war and post-war years. In this respect the testimony tended to support the position taken by the Government witness that war years should

be eliminated or their use restricted. Puerto Rican American obtains its raw sugar from a nearby affiliated central (raw mill) and from a number of independent centrals located at varying distances from the refinery (R. 93, 208-211). The Puerto Rican American witness testified at some length as to how the various restrictions and controls during the war and post-war years had hampered the production and movement of direct-consumption sugar by that company. The rationing of gasoline and tires and the regulation of transportation by trucks interfered with the movement of raw sugar to the refinery and of direct-consumption sugar to shipping ports (R. 157-160). Lack of adequate and timely shipping to move sugar to the continental United States created storage problems (R. 157), which at times slowed down or stopped production (R. 162, 185, 238-239). Other difficulties related to a shortage of bags for both raw and direct-consumption sugar (R. 158) and to the steps necessary to meet "black-out" regulations (R. 158-159). The witness stated that the shipping difficulties experienced by Puerto Rican American were greater than those experienced by other refineries in Puerto Rico because of the greater quantity of sugar which they had to ship (R. 181, 226). The amount of raw sugar which could be refined from the 1944, 1945, 1946, and 1947 crops was controlled by the Commodity Credit Corporation (R. 162-163). The witness testified that Puerto Rican American had planned to ship 85,000 tons of sugar to the continental United States in 1947, but was limited to approximately 60,000 tons by the Commodity Credit Corporation (R. 165-166; Ex. 10).

The witness for Central Roig Refining Company (herein called "Roig") testified that many changes have occurred in the refining situation in Puerto Rico during the past ten years. Some refiners have increased their capacity, some have marketed relatively more direct-consumption sugar in Puerto Rico than in the continental United States, and some have extended considerably the period during the

year in which they make refined sugar (R. 113). Roig has increased its capacity to produce direct-consumption sugar and has increased its marketings of such sugar both in the continental United States and in Puerto Rico (R. 114). The witness stated that in view of these changes, the years 1938-1947, inclusive, constitute a representative period for measuring past marketings (R. 15). The witness stated that it is unfair to include years prior to 1938 because some refineries, including Roig, did not operate in all of the years 1935, 1936, and 1937 (R. 115). The use of the period 1935-1941, inclusive, was said to be unrepresentative and discriminatory against Roig and Igualdad (Western Sugar Refining Company) and preferential to their competitors (R. 115-116). The witness stated further that the selection of the highest one year's delivery during the period 1935-1947, inclusive, as proposed by the Government witness, was inadequate because marketings from 8 to 13 years in the past were no indication of present ability to market sugar (R. 116-117). "Ability to market" refers to ability to market in the continental United States and, to the extent that any refiner has, in recent years, elected to reduce its continental marketings in order to increase local marketings in Puerto Rico, its ability has decreased (R. 117). Ability to market in any year should be measured by marketings during the next preceding year (R. 116). The witness for Roig then proposed that allotments be made by giving equal weight to past marketings and ability to market, but that past marketings be measured by the average of such marketings for the period 1938-1947, inclusive, and that ability to market be measured by marketings during 1947 (R. 118-119). The witness further proposed that the unallotted reserve be determined on the basis of marketings of raw sugar for direct-consumption during the years 1938-1947, inclusive (R. 119). The witness stated that his recommendation was in line with the action taken by the Secretary in alloting the direct-consumption portion of the Puerto Rican sugar quota for prior years (R. 119-120). The witness also asked that if the Secretary is re-

quired by law to give consideration to processing from proportionate shares some small weight be given that factor (R. 121). On cross-examination the witness testified that Roig experienced no shipping or other difficulties during the war period (R. 122-127, 147-149). Roig also presented evidence (Exs. 11, 12, and 13) to show that during the war and post-war years the three largest refiners in Puerto Rico (Puerto Rican American, Roig, and Igualdad) had greatly increased their local marketing of direct-consumption sugar but that Puerto Rican American had been able to do so only by decreasing its shipments of such sugar to the continental United States (R. 247-252).

The witness for Western Sugar Refining Company (herein called "Igualdad") objected to the formula proposed by the Government witness on the grounds that (1) ability to market is measured by marketings in too remote a period (R. 293-297), and (2) the period for measuring past marketings includes largely years in which marketing restrictions were in effect (R. 297). The Igualdad witness then proposed that allotments be made by giving equal weight to past marketings and ability to market, but that past marketings be measured by the average marketings of direct-consumption sugar in the continental United States during the years 1938-1947, inclusive, and that ability to market be measured by marketings of direct-consumption sugar in the continental United States during 1947 (R. 298-299). The witness recommended that the unallotted reserve be handled in the manner proposed by the Government witness (R. 299; Ex. 14). Igualdad also presented evidence (Exs. 15 and 16) to show that during the years 1942-1947, inclusive, Puerto Rican American increased its local sales of direct-consumption sugar but at the expense of its continental marketings, whereas Igualdad and Roig were able to increase their marketings of direct-consumption sugar both in Puerto Rico and in the continental United States during those years (R. 301-303). The witness stated further that if the Secretary is required by law to consider processings from proportionate shares, some weight be

given that factor (R. 306). The Igualdad witness stated that his company experienced some difficulties from wartime controls and restrictions, but was able to overcome them without due interference with production and marketing operations (R. 335-338).

Basis of allotment. Section 205 of the act reads in pertinent part as follows:

* * * Allotments shall be made in such manner and in such amounts as to provide a fair, efficient, and equitable distribution of such quota or proration thereof, by taking into consideration the processings of sugar or liquid sugar from sugar beets or sugarcane to which proportionate shares, determined pursuant to the provisions of subsection (b) of section 302, pertained; the past marketings or importations of each such person; and the ability of such person to market or import that portion of such quota or proration thereof allotted to him. * * *

The standard "processings of sugar—from—sugarcane to which proportionate shares—pertained" is not applicable to the allotment of the direct-consumption portion of the Puerto Rico sugar quota. The statute obviously refers to the processings of sugar from sugarcane by the prospective allottee. Normally sugar processed from sugarcane is in "raw" form and must be refined to produce what is commonly referred to as direct-consumption sugar. The three largest refiners in Puerto Rico (Puerto Rican American, Roig, and Igualdad) do not process raw sugar from sugarcane, but instead obtain their raw supplies from affiliated mills or from completely independent sources (R. 425 141-145; 208-209; Gilmore's Puerto Rico Sugar Manual, 1946-1947, p. 167, R. 261-262). These three refiners are separate and distinct corporations (Gilmore's Puerto Rico Sugar Manual, 1946-1947, pp. 167, 182, 198) and their operations must be viewed separate and apart from the operations of any affiliated company for the purpose of making allotments under section 205(a) of the act. Furthermore, the use of this standard would make all of the raw sugar mills in Puerto Rico eligible for an allotment

of direct-consumption sugar, although the great majority of these mills do not make refined sugar which constitutes the bulk of the Puerto Rican direct-consumption sugar (Puerto Rico Sugar Order No. 13, R. 255). Under the circumstances, the use of this standard is not considered mandatory.[1]

The other two standards specified in the act, namely, "past marketings" and "ability to market," are applicable and equal weight should be given to them in order to provide a "fair, efficient, and equitable distribution" of that portion of the quota to be allotted.

In determining past marketings, it is necessary to select a representative period which is fair and equitable to all refiners in Puerto Rico. The years selected should properly reflect the normal history of the individual company. Insofar as possible, each year selected should be a normal year. Ordinarily the most recent period of marketings recommends itself as reasonable. The past six years, however, represent a period of great abnormality for the sugar industry. From April 1942 until recently a national emergency has existed with respect to sugar (R. 255). Sugar was under price control from August 1941 until October 1947 (R. 256-257) and it was rationed from April 1942 until mid-year 1947 (R. 247). There was wartime control of both imports and exports of sugar and these controls were in effect until October 1947 (R. 255-256). Raw sugar was allocated to refiners in continental United States (R. 256) and similar allocations were made to refiners in Puerto Rico under the terms of crop purchase contracts between the Commodity Credit Corporation and Puerto Rican sugar producers (R. 162-163). Also, under the terms of the 1947-crop purchase contract, the Commodity Credit Corporation limited the amount of direct-consumption sugar which each Puerto Rican refiner could bring into the continental United States during 1947 (R. 165; Ex. 10). The "allotments" to Puerto Rican refiners for 1947 were made pursuant to spe-

[1] It was argued in the brief filed on behalf of Central Guánica (South Porto Rico Sugar Company) that the use of this standard was mandatory.

cific provisions of the purchase contract and not pursuant to the provisions of the act (R. 41-42; Ex. 10). Puerto Rico experienced many wartime land and water transportation difficulties, storage problems and shortages of bags and other essential materials. The impact of these and other dislocations affected refiners in varying degrees (Cf. Roig, R. 122-127, 147-149, and Puerto Rican American, R. 157-158, 160, 162, 185-225-230). It is apparent from the record that the past six years are not representative years for past marketings and should not be used. The pre-war years 1935-1941, inclusive, are deemed to constitute a representative period for measuring past marketings. However, some recognition should be given to those refiners who did not operate in all those seven years (R. 115), and therefore, it is believed that the use of each refiner's average of the highest five years of marketings during such seven-year period will afford a fair and equitable measure of past marketings.

In determining ability to market, actual performance is considered a better measure than plant capacity. Therefore, this factor has been used in making allotments and plant capacity has served only as a check on the accuracy of the results. It seems more reasonable to measure ability by marketings over a relatively short period, since the use of an extended period would, in effect, give undue weight to past marketings. Marketings for a period of one year are deemed to constitute an adequate measure of ability. Under normal circumstances the selection of a recent year to measure ability would seem reasonable. The past six years, however, have been abnormal years for the sugar industry in Puerto Rico and elsewhere. Therefore, the selection of a recent year to measure ability for all Puerto Rican refiners would not be fair to some, and would not properly measure their ability. It is deemed fair to select a recent year from any refiner who despite wartime difficulties, has been able to demonstrate greater ability than was demonstrated during pre-war years. Due to the nature of the factors to be measured, it is considered appropriate in

measuring ability to use war and post-war years, although they have not been used in measuring past marketings because they were not deemed properly to represent the past performance of individual companies. Ability to market should be recognized under whatever conditions demonstrated, although the year selected may not for other purposes be regarded as normal or representative. In fairness to those refiners on whom the impact of war was greatest, it is considered fair and reasonable to select a pre-war year as a proper measure of their ability. Therefore, the best single year's performance during the past 13 years is deemed to afford a fair and equitable measure of the ability of each refiner to market direct-consumption sugar.

It is deemed desirable to reserve 5,169 short tons of sugar to be set aside for persons who bring in raw sugar from Puerto Rico for direct-consumption purposes, which amount represents the average quantity of such sugar brought in for direct-consumption during the years 1935-1941. It is not considered practicable to allot this quantity of sugar to individual mills, inasmuch as it would have to be allotted to 34 raw sugar mills, thereby rendering it impossible to make an efficient allotment as required by the act. (Puerto Rico Sugar Order No. 13, R. 255.) An allotment of this additional amount of sugar would require continental purchasers of raw sugar for direct-consumption to deal with a large number of sellers in order to obtain their requirements. Such disruption of customary trade practices could not reasonably be said to be an efficient distribution of this kind of sugar.

Findings. On the basis of the record of the hearing, I hereby find that:

1. The statutory standard of "processings of sugar * * * from * * * sugarcane to which proportionate shares * * * pertained" is not applicable to the allotment of the direct-consumption portion of the Puerto Rican sugar quota and the use of this standard is not mandatory.

2. On the basis of actual performance for representative periods, the potential capacity of Puerto Rican refiners to produce direct-consumption sugar during the calendar year 1948 is approximately 485,000 short tons of such sugar.

3. The amount of direct-consumption sugar which Puerto Rican refiners are equipped to produce in 1948 exceeds by more than one hundred percent the quantity of direct-consumption sugar which may be brought into the continental United States during 1948 and the quantity of such sugar needed for local consumption in Puerto Rico during 1948.

4. Due to wartime shipping difficulties, Government procurement programs and restrictions, and other wartime dislocations, the years 1942-1947, inclusive, are unrepresentative of past marketing history of Puerto Rican refiners and the use of such years would not result in a fair, efficient, and equitable distribution of the direct-consumption portion of the Puerto Rican sugar quota.

5. A fair and equitable measure of past marketings for each refiner is the average of the highest five years' marketings of direct-consumption sugar ~~in the~~ continental United States during the seven years 1935-1941, inclusive, and the past marketings of each refiner so measured are as follows:

Refiner	Short tons, raw value
Puerto Rican American Sugar Refinery	[1]105,039
Central Aguirre	[2]4,205
Central Roig Refining Co.	[3]18,054
Central Guanica	[4]3,856
Western Sugar Refining Co. (Igualdad)	[5]11,335
Central San Francisco	[6]2,123

[1] Average of years 1935, 1936, 1937, 1939, 1940.
[2] Average of years 1935, 1937, 1938, 1940, 1941.
[3] Average of years 1937, 1938, 1939, 1940, 1941.
[4] Average of years 1935, 1938, 1939, 1940, 1941.
[5] Average of years 1936, 1938, 1939, 1940, 1941.
[6] Average of years 1935, 1936, 1937, 1938, 1940.

6. The use of plant capacity does not afford a fair and equitable measure of the ability of Puerto Rican refiners to market direct-consumption sugar in the continental United States in 1948.

7. Marketings of direct-consumption sugar in the continental United States constitute a fair and equitable measure of the ability of Puerto Rican refiners to market direct-consumption sugar in the continental United States in 1948.

8. Due to wartime shipping difficulties, Government procurement programs and restrictions and other wartime dislocations, the use of marketings in the continental United States in 1947 or in any other year during the period 1942-1947, inclusive, as the sole measure of ability to market does not provide a fair and equitable measure of such ability for all Puerto Rican refiners.

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9. A fair and equitable measure of the ability of each refiner to market direct-consumption sugar in the continental United States is the highest single year's marketings therein during the period 1935-1947, inclusive, and the ability of each refiner so measured is as follows:

Refiner	Short tons, raw value
Puerto Rican American Sugar Refinery	[7]116,611
Central Aguirre	[8]10,535
Central Roig Refining Co.	[9]28,657
Central Guanica	[10]4,982
Western Sugar Refining Co. (Igualdad)	[11]29,908
Central San Francisco	[12]2,590

[7] 1935.
[8] 1947.
[9] 1940.
[10] 1939.
[11] 1947.
[12] 1936.

10. A small part of the direct-consumption portion of the Puerto Rican sugar quota is normally brought into the continental United States as raw sugar for direct-consumption.

11. The average annual quantity of raw sugar brough into the continental United States for direct-consumptio during the years 1935-1941, inclusive, which are representa tive years, was 5,169 short tons, raw value.

12. Compania Azucarera del Camuy will not market di rect-consumption sugar in the continental United States i 1948[2] and no allotment for that company is required for th calendar year 1948.

Conclusions. On the basis of the foregoing, and afte consideration of the briefs submitted by interested person following the hearing, I hereby determine and conclude (1) that the allotment of the direct-consumption portion o the 1948 sugar quota for Puerto Rico is necessary to prevent disorderly marketing of such sugar and to afford all inter ested persons an equitable opportunity to market such sugar in the continental United States (2) that in order to make a fair, efficient, and equitable distribution of the direct-con sumption portion of such quota, as required by section 20 (a) of the act, allotments should be made by giving equal weight to (a) past marketings, measured by the average of the highest five years of such marketings by each refiner during the period 1935-1941, inclusive, and (b) ability to market, measured by the highest single year's marketings during the period 1935-1947, inclusive and (3) that an unallotted reserve of 5,169 short tons of sugar, raw value, should be set aside for persons who bring raw sugar into the continental United States for direct consumption.

Order. Pursuant to the authority vested in the Secre tary of Agriculture by section 205 (a) of the act, it is hereby ordered:

§ 821.51. *Direct-consumption portion of the 1948 sugar quota for Puerto Rico*—(a) *Allotments.* The direct-con sumption portion of the 1948 sugar quota for Puerto Rico (126,033 short tons, raw value) is hereby allotted to the

[2] The record indicates that this company is not now engaged in the manu facture of refined sugar (R. 331-332).

following companies in the amounts which appear opposite their respective names:

Refiner	Direct-consumption allotment (short tons, raw value)
Puerto Rican American Sugar Refinery	79,258
Central Aguirre	5,291
Central Roig Refining Co.	16,698
Central Guanica	3,160
Western Sugar Refining Co. (Igualdad)	14,772
Central San Francisco	1,685
	120,864
Unallotted reserve for marketing of raw sugar for direct-consumption	5,169
	126,033

(b) *Restrictions on shipment.* Each of the companies named in paragraph (a) of this section is hereby prohibited from bringing into the continental United States, for consumption therein, during the calendar year 1948, any direct-consumption sugar (except such amount of raw sugar as may be brought in within the unallotted reserve) from Puerto Rico in excess of the marketing allotment therefor established in paragraph (a) of this section. (Sec. 205 (a) of Pub. Law 388, 80th Cong.)

Done at Washington, D. C., this 16th day of January 1948. Witness my hand and seal of the Department of Agriculture.

CLINTON P. ANDERSON,
Secretary of Agriculture.

(Seal)

[F. R. Doc. 48-621; Filed, Jan. 21, 1948; 8:45 a.m.]

432 Endorsement: Received Feb 5 1948 1:30 p.m. The Hearing Clerk U. S. Dept. of Agr. Office of Solicitor.

IN THE UNITED STATES DEPARTMENT OF AGRICULTURE

Docket No. SH-68

In the matter of

Allotment of Portion of 1948 Sugar Quota for Puerto Rico for Direct Consumption in the Continental United States.

Petition For Stay And Reconsideration of Order.

I.—PETITION.

Central Roig Refining Company and the Western Sugar Refinery Company respectfully petition that Puerto Rico Sugar Order 18 entitled "Decision and Order of the Secretary of Agriculture Allotting Direct Consumption Portion of 1948 Sugar Quota for Puerto Rico," published in the Federal Register January 22, 1948 (13 F. R. 310-313) and effective when so published, be reconsidered by the Secretary of Agriculture and pending such reconsideration be stayed or vacated.

II.—REASONS FOR PETITION.

Following the hearing in the above entitled matter December 18 and 19, 1947, the Secretary issued, and on January 22, 1948, made public and immediately effective, Order 18. Prior thereto neither the Presiding Officer nor any responsible officer of the Department of Agriculture made any recommended decision, and the Secretary without having presided at the reception of the evidence and without having first issued a tentative decision, made his final decision in the matter. This procedure was followed notwithstanding the "Request as to Subsequent Procedare" in the brief of Central Roig Refining Company (p. 22).

Further, Order 18 was made effective immediately on publication without waiting for the 30-day period provided by section 4(c) of the Administrative Procedure Act.

433 In consequence petitioners have been afforded no opportunity prior to the time Order 18 became final and effective to except to the findings in the Order with supporting reasons or to present argument that the Order is contrary to law on the following grounds:

A. Order 18 is beyond the authority conferred on the Secretary by section 205(a) of the Act in that—

1. The decision making allotments takes into consideration a standard not permitted by section 205(a), namely, restoration of prewar competitive conditions among the allottees.

2. The decision making allotments fails to take into consideration one of the three standards specified by section 205(a), namely, processings by the allottee of sugar to which proportionate shares pertained.

3. The decision making allotments is based on erroneous constructions and applications of the other two standards specified by section 205(a), namely, past marketings of the allottee, and the ability of the allottee to market the allotment made to him.

B. If Order 18 is within the authority conferred on the Secretary by section 205(a) of the Act, then said section is unconstitutional in that it authorizes discrimination between allottees that is so gross as to be contrary to the due process clause of the Fifth Amendment to the Constitution.

C. Order 18 is invalid since the aggregate of allotments therein is based on section 207(b) of the Act and said section imposes on Puerto Rican refiners of sugar a discrimination so gross as to be contrary to the due process clause of the Fifth Amendment to the Constitution.

434 D. Order 18 is invalid in that certain findings therein of the Secretary, Nos. 1, 4, 5, 6, 7, 8, and 9,

are not supported by substantial evidence of record but are arbitrary and capricious.

It is therefore submitted that Order 18 should be reconsidered by the Secretary and petitioners should be afforded opportunity to except to the findings of fact with supporting reasons and to argue orally or by brief all questions of law relating to the validity of the Order, and that Order 18 should be stayed or vacated pending such reconsideration.

Respectfully submitted,

FREDERIC P. LEE,
Attorney for Central Roig Refining Company and Western Sugar Refinery Company.
Address: 1200-18th Street, N.W.,
Washington 6, D. C.

435 Denial of Petition for Stay and Reconsideration of Order.

Feb. 11 1948

Mr. Frederic P. Lee
Attorney for Central Roig Refining Company and
Western Sugar Refining Company
1200 18th Street, Northwest
Washington, D. C.

Dear Mr. Lee:

Consideration has been given to your "Petition for Stay and Reconsideration of Order" allotting the direct consumption portion of the 1948 sugar quota for Puerto Rico, filed February 5, 1948, on behalf of Central Roig Refining Company and Western Sugar Refining Company, and to the views expressed in the conference yesterday in the office of the Director of the Sugar Branch, Production and Marketing Administration, in regard to this matter.

For reasons more fully explained in the decision issued with the Order (13 F. R. 310), the allotments to Puerto

Rican refiners appear to be proper on the basis of the record of the hearing and the applicable provisions of the Sugar Act of 1948. Your petition does not afford a satisfactory basis for the relief requested and, accordingly, it is denied.

Sincerely yours,

/s/ CLINTON P. ANDERSON,
Secretary.

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Endorsement: United States Court of Appeals for the District of Columbia Filed Feb 11 1948.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Docket No. 9769.

CENTRAL ROIG REFINING COMPANY AND WESTERN SUGAR REFINING COMPANY, *Appellants*,

v.

SECRETARY OF AGRICULTURE, *Appellee*.

Notice of Appeal and Petition for Review.

Notice is hereby given that the Central Roig Refining Company, a corporation duly organized and existing under the laws of Puerto Rico and having its principal place of business in Humacao, Puerto Rico, and the Western Sugar Refinery Company, a corporation duly organized under the laws of Puerto Rico and having its principal place of business in Mayaguez, Puerto Rico, the appellants above named, hereby appeal to the United States Court of Appeals for the District of Columbia from the decision of the Secretary of Agriculture in Puerto Rico Sugar Order 18 entitled "Decision and Order of the Secretary of Agriculture Allotting Direct Consumption Portion of 1948 Sugar Quota for Puerto Rico" (hereinafter referred to as "Order 18"), published in the Federal Register January 22, 1948 (13 F. R. 310-313) and effective when so published. Appellants petition for review of said decision and order by this Court.

Appellants respectfully show as follows:

I.—NATURE OF PROCEEDING AS TO WHICH REVIEW IS SOUGHT.

The Secretary of Agriculture (hereinafter referred to as the "Secretary"), purporting to act pursuant to section 205(a) of the Sugar Act of 1937 (50 Stat. 906), U. S. C., Title 7, § 1115(a), published in the Federal Register for December 6, 1947 (12 F. R. 8210-8211) a "Notice of Hearing on Proposed Allotment" of direct consumption portion of

1948 sugar quota for Puerto Rico to appellants and others, and thereafter on December 18 and 19, 1947, caused a hearing to be held pursuant to said Notice and subsequently purporting to act pursuant to section 205(a) of the Sugar Act of 1948 (Pub. 388, 80th Cong.), hereinafter referred to as the "Act," issued Order 18 making allotments to appellants and others. Appellants filed with the Secretary of Agriculture on February 5, 1948, their Petition for Stay and Reconsideration of Order which petition was denied on February 11th.

II.—Facts and Statutes Upon Which Jurisdiction is Based.

The appellants are allottees under Order 18, are aggrieved by reason of the decision therein of the Secretary granting the allotments made to them, and are entitled to appeal to this Court from said Order under section 205 of the Act and to petition this Court for judicial review of Order 18 under section 10 of the Administrative Procedure Act (60 Stat. 243), U. S. C., Title 5, § 1009. This Court has jurisdiction of the appeal from Order 18 and to review Order 18 under said sections of said Acts.

III.—Relief Prayed.

Appellants pray that this Court enter a judgment reversing the decision of the Secretary in Order 18 and holding unlawful and setting aside said Order.

IV.—Statement of Reasons for Appeal and Points on which Appellants Intend to Rely.

A. Order 18 is beyond the authority conferred on the Secretary by section 205(a) of the Act in that—

1. The decision making allotments takes into consideration a standard not permitted by section 205(a), namely restoration of prewar competitive conditions among the allottees.

2. The decision making allotments fails to take into consideration one of the three standards specified by section 205(a), namely, processings by the allottee of sugar to which proportionate shares pertained.

3. The decision making allotments is based on erroneous constructions and applications of the other two standards specified by section 205(a), namely, past marketings of the allottee, and the ability of the allottee to market the allotment made to him.

B. If Order 18 is within the authority conferred on the Secretary by section 205(a) of the Act, then said section is unconstitutional in that it authorizes discrimination between allottees that is so gross as to be contrary to the due process clause of the Fifth Amendment to the Constitution.

C. Order 18 is invalid since the Act, and more particularly section 205(a) and section 207(b), is in excess of the commerce power and is contrary to the due process clause of the Fifth Amendment as an arbitrary restriction of commerce with territory incorporated into the United States.

D. Order 18 is invalid in that certain findings therein of the Secretary, namely, Nos. 1, 4, 5, 6, 7, 8, and 9, are not supported by substantial evidence of record but are arbitrary and capricious.

/s/ FREDERIC P. LEE,
Attorney for Appellants, Central Roig Refining Company and Western Sugar Refinery Company.

Attorney's address:
1200 18th Street N. W.
Washington 6, D. C.

Service of the above Notice of Appeal and Petition for Review by receipt of a true copy thereof is acknowledged this 11th day of February, 1948.

/s/ CARROLL HUNTER,
Solicitor for Appellee.

Endorsement: United States Court of Appeals for the District of Columbia Filed Mar. 11, 1948.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

January Term, 1948.

Docket No. 9769.

CENTRAL ROIG REFINING COMPANY AND WESTERN SUGAR REFINING COMPANY, *Appellants*,

v.

CLINTON P. ANDERSON, Secretary of Agriculture, *Appellee*.

Notice of Intention to Intervene and Verified Statement of the Porto Rican American Sugar Refinery, Inc., in Support Thereof.

The Porto Rican American Sugar Refinery, Inc. a corporation organized under the laws of Puerto Rico, with its principal place of business in Mercedita, Puerto Rico, hereinafter referred to as "Intervenor", hereby gives notice in accordance with sub-division (d) of Section 205 of the "Sugar Act of 1948", (Public Law 388—80th Congress, 1st session), of its intention to intervene and participate in the proceedings had upon the appeal of Central Roig Refining Company and Western Sugar Refinery Company, from the order and decision of Honorable Clinton P. Anderson, Secretary of Agriculture, effective January 22, 1948, whereby the direct-consumption portion of the 1948 sugar quota for Puerto Rico for marketing in Continental United States for the calendar year 1948, was allotted among the several persons interested (13 Federal Register 310-313).

The nature of intervenor's interest in this proceeding is as follows:

Intervenor is, and has for a period of twenty-two years past, been a refiner, shipper in interstate commerce and marketer in Continental United States of refined cane sugar

and in competition in said market with Central Roig Refining Company for approximately eleven years and with Western Sugar Refinery Company, for approximately ten years.

Intervenor was given notice by the Secretary of Agriculture and thereafter participated in a public hearing conducted by the Secretary of Agriculture at Washington, D. C. on December 18, 1947, for the purpose of receiving evidence from all persons interested to enable him "to make a fair, efficient, and equitable distribution of that portion of the 1948 sugar quota for Puerto Rico for consumption in the Continental United States which may be filled by direct-consumption sugar" among all persons entitled to market Puerto Rican direct-consumption sugar in Continental United States for the calendar year 1948.

Based upon the evidence received and the record made at such hearing, the Secretary of Agriculture did, on January 22, 1948, make his order and decision alloting and apportioning the quota hereinbefore referred to among the several persons interested including appellants and intervenor.

By its appeal, appellants seek a judgment and decision of this court modifying or reversing the order and decision of the Secretary.

By the order and decision complained of, intervenor received an allotment whereby it may ship in interstate commerce and market direct-consumption sugar in continental United States during the year 1948.

Intervenor will be aggrieved and its interests adversely affected by a reversal or modification of the Secretary's order in the particulars prayed for by Appellants.

The rights and interests of intervenor are directly involved in the above entitled appeal and proceedings to be had pursuant thereto.

Pursuant to sub-section (c) of Section 205 of the Sugar Act of 1948, the Secretary of Agriculture has mailed a copy of the Notice of Appeal and Petition for Review from said decision and order, effective January 22, 1948, allotting the

direct-consumption portion of 1948 sugar quota for Puerto Rico, to intervenor as a person shown by the records of the Secretary to be interested in such appeal and to have a right to intervene therein under the provisions of said section.

Dated March 8th, 1948.

PORTO RICAN AMERICAN SUGAR REFINERY, INC.,
Intervenor.

By: F. J. SERRALLÉS,
Director.

Mercedita, Puerto Rico.

ARTHUR L. QUINN,
1625 K Street, N.W.,
Washington, D. C.

GORDON P. PEYTON,
Shoreham Building,
Washington, D. C.

ORLANDO J. ANTONSANTI,
P. O. Box 829,
San Juan, Puerto Rico.
Attorneys for the Porto Rican American Sugar Refinery, Inc., Intervenor.

By: ARTHUR L. QUINN.

City of San Juan, Island of Puerto Rico, ss:

Felix Juan Serrallés, of lawful age, being first duly sworn upon oath deposes and says:

That he is one of the Directors of the Porto Rican American Sugar Refinery, Inc., the above named Intervenor and is authorized to make this verification on its behalf; that he has read the above and foregoing Notice of Intention to Intervene and Verified Statement of the Porto Rican American Sugar Refinery, Inc., that he knows the contents

thereof and that the matters and things therein set forth are true.

F. J. SERRALLÉS.

Affidavit No. 800

Sworn and subscribed to before me by Felix Juan Serralés, of legal age, married and a resident of Ponce, Puerto Rico, personally known to me, and known to be the person so subscribing, at San Juan, Puerto Rico, on this 8th day of March, 1948.

O. J. ANTONSANTI,
Notary Public.

(Seal)

My Commission runs indefinitely.

PROOF OF SERVICE.

Service and receipt of a true copy of the within Notice of Intention to Intervene and Verified Statement of the Porto Rican American Sugar Refinery, Inc. is hereby acknowledged this 11th day of March, 1948.

CLINTON P. ANDERSON,
Secretary of Agriculture.

By: W. CARROLL HUNTER,
Solicitor.

PROOF OF SERVICE.

Service and receipt of a true copy of the within Notice of Intention to Intervene and Verified Statement of the Porto Rican American Sugar Refinery, Inc. is hereby acknowledged this 11th day of March, 1948.

CENTRAL ROIG REFINING CO.,
WESTERN SUGAR REFINERY CO.,

By: FREDERIC P. LEE,
Their Attorney.

Endorsement: United States Court of Appeals for the District of Columbia Filed Mar. 12, 1948.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Docket No. 9769.

CENTRAL ROIG REFINING COMPANY AND WESTERN SUGAR REFINING COMPANY, *Appellants*,

v.

SECRETARY OF AGRICULTURE, *Appellee*.

Notice of Intention to Intervene.

Notice is hereby given that, pursuant to Section 205 (d) of the Sugar Act of 1948 (Public Law 388, 80th Cong., 1st Sess., 7 U. S. C., Section 1115 (d)), The American Sugar Refining Company, Godchaux Sugars, Inc., Henderson Sugar Refinery, Inc., Imperial Sugar Company, Inland Sugar Company, The National Sugar Refining Company, Refined Syrups and Sugars Revere Sugar Refinery, Savannah Sugar Refining Corporation, and Western Sugar Refinery (hereinafter referred to as "Intervenors") intend to intervene in this proceeding. The Nature of the interest of the Intervenors appears from the statement attached hereto.

DEAN ACHESON,
Attorney for Intervenors,
701 Union Trust Building,
Washington 5, D. C.

Of Counsel:
COVINGTON, BURLING, RUBLEE, ACHESON & SHORB,
701 Union Trust Building,
Washington 5, D. C.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Docket No. 9769.

CENTRAL ROIG REFINING COMPANY AND WESTERN SUGAR REFINING COMPANY, *Appellants*,

v.

SECRETARY OF AGRICULTURE, *Appellee*.

Statement of Interest.

Come now the Intervenors named in the foregoing Notice of Intention to Intervene and file this statement of the nature of their respective interests:

1. The American Sugar Refining Company is a corporation organized and existing under the laws of the State of New Jersey, and having its principal office in New York, New York.

Godchaux Sugars, Inc. is a corporation organized and existing under the laws of the State of New York and having its principal office in New Orleans, Louisiana.

Henderson Sugar Refinery, Inc. is a corporation organized and existing under the laws of the State of Louisiana and having its principal office in New Orleans, Louisiana.

Imperial Sugar Company is a corporation organized and existing under the laws of the State of Texas and having its principal office in Galveston, Texas.

Inland Sugar Company is a corporation organized and existing under the laws of the State of Delaware and having its principal office in Milwaukee, Wisconsin.

The National Sugar Refining Company is a corporation organized and existing under the laws of the State of New Jersey and having its principal office in New York, New York.

Refined Syrups and Sugars, Inc. is a corporation organized and existing under the laws of the State of New York and having its principal office in Yonkers, New York.

Revere Sugar Refinery is a corporation organized and existing under the laws of the Commonwealth of Massachusetts and having its principal office in Charlestown, Massachusetts.

Savannah Sugar Refining Corporation is a corporation organized and existing under the laws of the State of New York and having its principal office in Savannah, Georgia.

Western Sugar Refinery is the cane sugar refining department of J. D. & A. B. Spreckels Company, a corporation organized and existing under the laws of the State of California and having its principal office in San Francisco, California.

2. Each of the corporations above named (hereinafter collectively referred to as the Intervenors) owns one or more cane sugar refineries in the continental United States, and is engaged in refining and marketing cane sugar in the continental United States. The Intervenors as a group distribute approximately 80% of all cane sugar refined in the United States and approximately 60% of all refined sugar distributed for consumption in the United States.

3. The Notice of Appeal and Petition for Review filed by Appellants herein attacks the validity of Puerto Rico Sugar Order 18, issued by the Secretary of Agriculture under the Sugar Act of 1948 (Public Law 388, 80th Cong., 1st Sess., 7 U. S. C., Sections 1101-60), hereinafter sometimes called the Sugar Act, upon two grounds. The first is that the allotments made by the Secretary of Agriculture in said Order 18 are unlawful because based upon erroneous findings of fact and upon improper application of the standards prescribed in Section 205 (a) of the Act. Intervenors claim no interest in this aspect of the appeal.

4. The second ground of attack upon Order 18 is that the Sugar Act, and particularly Sections 205 (a) and 207 (b) thereof, are unconstitutional because in excess of the commerce power of the Federal Government and contrary to the due process clause of the Fifth Amendment. Inter-

venors are interested parties and would be adversely affected by a reversal of Order 18 upon the ground that the Sugar Act, and particularly Section 207 (b) thereof, is unconstitutional.

5. Like its predecessors, the Jones-Costigan Sugar Act of 1934 and the Sugar Act of 1937, the Sugar Act of 1948 has as its primary objective the stabilization of the sugar producing, refining and importing industries. In administering the Sugar Act the Secretary of Agriculture is subject to the overall mandate of protecting the welfare of consumers and of those engaged in the domestic sugar industry by assuring a supply of sugar at prices which will not be excessive to consumers and which will fairly and equitably maintain and protect the sugar industry of the United States (H. R. Rep. No. 796, 80th Cong., 1st Sess., 1, 2 (1947)).

6. To effectuate these purposes, the Sugar Act directs the Secretary of Agriculture to determine for each calendar year, in accordance with certain standards and subject to periodic revision, the amount of sugar needed to meet the requirements of consumers in the continental United States (Sugar Act, Sect. 201). Acting pursuant to this direction the Secretary has determined the requirements for the calendar year 1948 as 7,500,000 short tons, raw value (13 Federal Register 131, 1145).

7. When a determination is made, as set forth in the preceding paragraph, the Secretary is directed to establish or revise quotas for the sugar producing areas specified in the Act (Sugar Act, Sect. 202). The basic quotas established by the Act, and the actual 1948 quotas in short tons, raw value, as most recently revised by the Secretary, are as follows:

Production Area	Basic Quota	1948 Quota
Domestic Beet Sugar	1,800,000	1,847,738
Mainland Cane Sugar	500,000	513,260
Hawaii	1,052,000	900,000
Puerto Rico	910,000	934,134
Virgin Islands	6,000	6,159
Philippines	952,000	290,000
Cuba		2,943,509
Other foreign countries (Balance of requirement, of which Cuba is entitled to 98.64%)		63,700
Unallotted		1,500
Total		7,500,000

8. Under Section 209 of the Sugar Act it is unlawful for any person to import into the continental United States, or to ship, transport or market in interstate commerce, or in competition with sugar shipped, transported or marketed in interstate or foreign commerce, any sugar after the applicable quota has been filled. Supplies of raw sugar to maintain production of domestic cane sugar refineries operated by the Intervenors must be obtained within the established quotas for the respective producing areas. For many years the greater part of the raw sugar requirements of domestic cane sugar refiners have been obtained from sources outside the continental United States.

9. Under the quota system established by the Sugar Act, if the quotas of producing areas outside the continental United States were filled by imports of refined sugar rather than raw sugar, the domestic cane sugar refiners would be without adequate sources of raw sugar to maintain production. To effectuate the purpose of the Sugar Act to "fairly and equitably maintain and protect the welfare of the domestic sugar industry", Section 207 thereof provides that not more than specified numbers of short tons, raw value, of the quotas of areas outside the continental United States may be filled by refined sugar. The refined sugar quota for Puerto Rico is set at 126,033 short tons raw value

(Sugar Act, Sect. 207 (b)) leaving a balance of 808,101 such tons from its 1948 quota available to fill the needs of domestic cane sugar refiners, including the Intervenors.

10. Puerto Rico has sugar refining capacity far in excess of local Puerto Rican requirements and the Puerto Rican refined quota of 126,033 short tons, raw value. Offshore sugar refining has the advantage over continental refining of the low wages prevailing outside the United States. In the past, offshore sugar refining has been rapidly increased when profitable opportunity was offered, and it could and would be rapidly increased if Section 207 of the Sugar Act were held unconstitutional. In the event of such a holding, United States refiners, including the Intervenors, would immediately lose a large part, and within a short period substantially all, of the Puerto Rican raw sugar upon which they rely to maintain production. Under the established quotas total supplies of raw cane sugar available to United States refiners are approximately 5,000,000 short tons, raw value, and loss of the Puerto Rican raw sugar which could not be made up from other areas by reason of the quotas, would amount to more than 15% of the total supply.

11. United States sugar refiners, including the Intervenors, have for many years been operating at a rate substantially below capacity. Curtailment of operations by an additional 15% would seriously and adversely affect the interests of United States refiners, including the Intervenors, not only by the direct loss of production, but also by the loss of economies flowing from volume operation.

DEAN ACHESON,
Attorney for Intervenors,
701 Union Trust Building,
Washington 5, D. C.

Of Counsel:
COVINGTON, BURLING, RUBLEE, ACHESON & SHORB,
701 Union Trust Building,
Washington 5, D. C.

District of Columbia, ss:

Dean Acheson, being duly sworn, deposes and says:

That he is the attorney for the Intervenors named in the foregoing Statement of Interest, duly authorized by each of them to verify said statement; that he has read said statement and knows the contents thereof; and that he verily believes the facts stated therein to be true.

DEAN ACHESON.

Subscribed and sworn to before me this 12th day of March, 1948.

MARGARET MACPHERSON,
Notary Public.

(Seal)

Service of the above Notice of Intention to Intervene and Statement of Interest by receipt of true copies thereof is acknowledged this 12th day of March, 1948.

FREDERIC P. LEE,
Attorney for Appellants.

W. CARROLL HUNTER,
Solicitor, Dept. of Agriculture
Attorney for Appellee.

ARTHUR L. QUINN,
Attorney, Porto Rico American Sugar Refinery, Inc.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9769

CENTRAL ROIG REFINING COMPANY AND WESTERN SUGAR REFINING COMPANY, APPELLANTS

v.

SECRETARY OF AGRICULTURE, APPELLEE

PORTO RICAN AMERICAN SUGAR REFINERY, INC., INTERVENOR

THE AMERICAN SUGAR REFINING COMPANY, ET AL., INTERVENORS

GOVERNMENT OF PUERTO RICO, INTERVENOR

On appeal from an order of the Secretary of Agriculture

Argued October 6, 1948 Decided November 24, 1948

United States Court of Appeals for the District of Columbia Circuit. Filed Nov. 24, 1948. Joseph W. Stewart, Clerk.

Mr. Frederic P. Lee for appellants.

Mr. James A. Doyle, Associate Solicitor, Department of Agriculture, of the Bar of the Supreme Court of Nebraska, *pro hac vice* by special leave of court, with whom *Messrs. George Morris Fay*, United States Attorney, and *J. Stephen Doyle, Jr.*, Special Assistant to the Attorney General, were on the brief for appellee. *Messrs. Sidney S. Sachs* and *John D. Lane*, Assistant United States Attorneys, also entered appearances for appellee.

Messrs. Arthur L. Quinn and *Orlando J. Antonsanti*, with whom *Mr. Gordon P. Peyton* was on the brief, for intervenor Porto Rican American Sugar Refinery, Inc., urging affirmance. *Mr. Dean G. Acheson*, with whom *Mr. Donald Hiss* was on the brief, for intervenors American Sugar Refining Company, *et al.*, urging affirmance.

Mr. Walton Hamilton, with whom *Mr. Thurman Arnold* was on the brief, for intervenor Government of Puerto Rico, urging reversal. *Mr. Abe Fortas* also entered an appearance for intervenor Government of Puerto Rico.

Before EDGERTON, CLARK, and WILBUR K. MILLER, JJ.

EDGERTON, J.: Section 207 (b) of the Sugar Act of 1948 provides that "Not more than one hundred and twenty-six thousand and

thirty-three short tons, raw value, of the quota for Puerto Rico for any calendar year may be filled by direct-consumption sugar." 61 Stat. 922, 927. "The quota for Puerto Rico" means the quantity of sugar that may be imported into continental United States from Puerto Rico. "Direct-consumption sugar" means, approximately, refined sugar.

Section 205 (a) of the Act provides that whenever the Secretary of Agriculture "finds that the allotment of any quota, or proration thereof, . . . is necessary to . . . prevent disorderly marketing . . . or to afford all interested persons an equitable opportunity to market sugar . . . he shall [allot] to persons who market or import sugar . . . the quantities . . . which each such person may market in continental United States . . . for consumption therein. Allotments shall be made in such manner and in such amounts as to provide a fair, efficient, and equitable distribution of such quota . . ., by taking into consideration the processings of sugar or liquid sugar from sugar beets or sugarcane to which proportionate shares, determined pursuant to the provisions of subsection (b) of section 302, pertained;[1] the past marketings or importations of each such person; and the ability of such person to market or import that portion of such quota . . . allotted to him." If, then, allotments are made at all, they "shall be made . . . by taking into consideration" three factors or standards: (1) processings of "proportionate shares" sugar, (2) "past marketings," and (3) "ability . . . to market."

Much more direct-consumption sugar is on the market in Puerto Rico than the 126,033 tons that § 207 (b) permits to be imported into the United States. In Puerto Rico Sugar Order 18, 13 Fed. Reg. 310, 313, the Secretary concluded "(1) that the allotment of the direct-consumption portion of the 1948 sugar quota for Puerto Rico is necessary to prevent disorderly marketing of such sugar and to afford all interested persons an equitable opportunity to market such sugar in the continental United States; (2) that in order to make a fair, efficient, and equitable distribution of the direct-consumption portion of such quota, as required by section 205 (a) of the act, allotments should be made by giving equal weight to (a) past marketings, measured by the average of the highest five years of such marketings by each refiner during the period 1935–1941, inclusive, and (b) ability to market, measured by the highest single year's marketings during the period 1935–47, inclusive." The order allots direct-consumption sugar, among refiners operating in Puerto Rico, in accordance with these views.

[1] This means sugar from sugar beets or sugarcane not exceeding the producing farm's proportionate share of the quantity required to be processed to enable the producing area to meet its quota. § 301 (b).

The appellants, two refineries operating in Puerto Rico, bring the order here on appeal under § 205 of the Act. They contend that the order discriminates against them in violation of the Act and of the Constitution. They attack the constitutionality of § 207 (b) and the alleged compliance of the order with § 205 (a). Porto Rican American Sugar Refinery, Inc., to which the order is very favorable, intervenes in its support. The Government of Puerto Rico intervenes to attack the constitutionality of § 207 (b). The American Sugar Refining Company and other mainland refiners intervene to defend its constitutionality.

Though the order purports to give effect to "ability to market" we think it fails to do so. The Secretary argues that "in fairness to those refiners on whom the impact of war was greatest, it is considered fair and reasonable to select a prewar year as a proper measure of their ability. Therefore, the best single year's performance during the past 13 years is deemed to afford a fair and equitable measure of the ability of each refiner to market direct-consumption sugar." We cannot follow this argument. Performance in the 12 years before 1947 has nothing to do with ability to market in 1948. The Secretary's argument undertakes to equate each refiner's ability to market with the right to market that the Secretary thinks the refiner ought, as a matter of fairness, to have. By requiring the Secretary to take into consideration ability to market, Congress foreclosed the question whether wartime dislocations made it unfair to do so. Actual performance may be, as the order says, a better measure of ability to market than plant capacity. But since the ability to be measured is current ability, if performance is to be the measure it must be current performance.

We think the order also fails to give effect to "past marketings." "Past marketings," as that term is used in the Act, plainly includes marketings within the last half-dozen years or at least the more recent of them.[2] It is doubtful whether the term includes anything else. As of 1948, the average of the highest five years during the period 1935–1941 is, in our opinion, no measure of "past marketings." In excluding the six years 1942–1947 the order fails to comply with the Act.

The order does not even purport to give effect to "processings . . . to which proportionate shares . . . pertained." The Secretary thought this standard "not applicable" for the following reasons. In his opinion the processings to which it refers are processings of sugarcane into raw sugar and do not include the proc-

[2] *Cf.* "There is no merit in the contention that restricting consideration of past marketings to the preceding four years arbitrarily discriminated against those whose marketing experience antedated that period." *Gay Union Corp. v. Wallace*, 71 App. D. C. 382, 388, 112 F. 2d 192, 198, *cert. denied*, 310 U. S. 647.

essing of raw into refined sugar.[3] Raw sugar "must be refined to produce what is commonly referred to as direct-consumption sugar. The three largest refiners in Puerto Rico (Puerto Rican American, Roig, and Igualdad) do not process raw sugar from sugarcane, but instead obtain their raw supplies from affiliated mills or from completely independent sources . . ."[4] No doubt facts of this sort may be considered in determining how much weight should be given to processings of proportionate-shares sugar. In our opinion they cannot justify refusal to give this standard any weight at all. If § 205 (a) merely directed the Secretary, in making allotments, to give consideration to the several standards, his view that he need not give weight to all of them might perhaps be tenable. But it directs him to make allotments *by* taking into consideration the several standards. In our opinion this cannot be done without giving some effect to each. Any possible doubt as to the intention of Congress in this respect seems to us to be removed by the fact that in the Sugar Act of 1948 Congress changed the word "or"[5] to "and," after this court had expressly held that the word "or" in the 1937 act justified the Secretary in denying effect to one of the three standards.[6]

We take these to be "questions of law" concerning which the Sugar Act requires us to review the Secretary's order. We must therefore reverse it and remand the case to him. A majority of the court are of opinion that since the order is not authorized by the Act we cannot, within established principles of review, undertake to decide whether § 207 (b) of the Act is authorized by the Constitution. All agree that this question has been fully argued, and my own view is that we should decide it.

Reversed.

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[3] This construction is certainly a legitimate one but is not, we think, the only possible one.

[4] The Secretary added: "Furthermore, the use of this standard would make all of the raw sugar mills in Puerto Rico eligible for an allotment of direct-consumption sugar, although the great majority of these mills do not make refined sugar which constitutes the bulk of the Puerto Rican direct-consumption sugar." We think this erroneous. Section 205 (a) provides for allotments "to persons who market or import sugar"; meaning, evidently, persons who market or import the sort of sugar that is to be allotted. No allotment need be made to other persons.

[5] Before "the ability of such person to market . . ." 50 Stat. 906.

[6] *Gay Union Corp.* v. *Wallace*, *supra* note 2.

United States Court of Appeals for the District of Columbia Circuit

October Term, 1948

No. 9769

CENTRAL ROIG REFINING COMPANY AND WESTERN SUGAR REFINING COMPANY, APPELLANTS

v.

SECRETARY OF AGRICULTURE, APPELLEE

PORTO RICAN AMERICAN SUGAR REFINERY, INC., THE AMERICAN SUGAR REFINING COMPANY ET AL., GOVERNMENT OF PUERTO RICO, INTERVENORS

On Appeal from an Order of the Secretary of Agriculture

United States Court of Appeals for the District of Columbia Circuit. Filed Nov. 24, 1948. Joseph W. Stewart, Clerk.

Before EDGERTON, CLARK AND WILBUR K. MILLER, JJ.

Judgment

This cause come on to be heard on the transcript of the record from the Secretary of Agriculture, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the Secretary of Agriculture appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the Secretary of Agriculture for further proceedings not inconsistent with the opinion of this Court.

Per Circuit Judge EDGERTON.

Dated November 24, 1948.

United States Court of Appeals for the District of Columbia Circuit

United States Court of Appeals for the District of Columbia Circuit. Filed Dec. 9, 1948. Joseph W. Stewart, Clerk.

No. 9769

CENTRAL ROIG REFINING CO. AND WESTERN SUGAR REFINING COMPANY, APPELLANT

v.

SECRETARY OF AGRICULTURE, APPELLEE

Motion to stay mandate

Comes now the appellee by his attorney, the United States Attorney, and moves that the mandate in the above-entitled case be stayed for 30 days pending application to the Supreme Court of the United States for a Writ of Certiorari.

(S) George Morris Fay,
GEORGE MORRIS FAY,
United States Attorney.

(S) John D. Lane,
JOHN D. LANE,
Assistant United States Attorney.

Certificate of service

I certify that service of the foregoing Motion has been made upon appellant by mailing a copy thereof to their attorneys, addressed as follows; Abe Fortas and Thurman Arnold at the Ring Building, Washington, D. C.; Walton H. Hamilton at 1200 18th Street, NW., Washington, D. C.; Arthur L. Quinn at 1625 K Street, NW., Washington, D. C.; and Dean Acheson at 701 Union Trust Building, Washington, D. C.; and upon appellant's attorneys Orlando J. Antonsanti at P. O. Box 829 San Juan, Porto Rico and Frederic P. Lee at 1200 18th Street, NW., Washington, D. C.

(S) John D. Lane,
JOHN D. LANE,
Assistant United States Attorney.

DECEMBER 9, 1948.

United States Court of Appeals for the District of Columbia Circuit

October Term, 1948

United States Court of Appeals for the District of Columbia Circuit. Filed Dec. 22, 1948. Joseph W. Stewart, Clerk.

No. 9769

CENTRAL ROIG REFINING CO. AND WESTERN SUGAR REFINING COMPANY, APPELLANTS

v.

SECRETARY OF AGRICULTURE, APPELLEE

Order

On consideration of appellee's motion to stay the issuance of certified copy of the opinion and judgment herein for 30 days pending application to the Supreme Court for allowance of a writ of certiorari, It is

Ordered by the Court that the issuance of a certified copy of the opinion and judgment herein be, and it is hereby, stated to and including December 24, 1948.

Per curiam.

Dated: December 22, 1948.

United States Court of Appeals for the District of Columbia Circuit

United States Court of Appeals for the District of Columbia Circuit. Filed Dec. 23, 1948. Joseph W. Stewart, Clerk.

No. 9769

CENTRAL ROIG REFINING CO. AND WESTERN SUGAR REFINING COMPANY, APPELLANTS

v.

SECRETARY OF AGRICULTURE, APPELLEE

Motion for further stay of issuance of certified copy of opinion and judgment

Comes now the appellee by his attorney, the United States Attorney, and moves for a stay of the issuance of a certified copy of the Court's opinion and judgment, presently stayed to and including December 24, 1948, to and including January 24, 1949,

for the reason that the appellee is considering a petition to the Supreme Court of the United States for a Writ of certiorari.

(s) George Morris Fay,
GEORGE MORRIS FAY,
United States Attorney.

(s) John D. Lane
JOHN D. LANE,
Assistant United States Attorney.

Certificate of service

I certify that service of the foregoing Motion has been made upon the appellant and intervenors by mailing a copy to their respective attorneys, this 23d days of December 1948, addressed as follows: Abe Fortas and Thurman Arnold, Ring Building, Washington, D. C.; Walton H. Hamilton, 1200 18th Street NW., Washington, D. C.; Arthur L. Quinn, 1625 K Street NW., Washington, D. C.; Dean Acheson, 701 Union Trust Building, Washington, D. C.; Orlando J. Antonsanti, P. O. Box 829, San Juan, Porto Rico; and Frederic P. Lee, 1200 18th Street NW., Washington, D. C.

(s) John D. Lane,
JOHN D. LANE,
Assistant United States Attorney.

United States Court of Appeals for the District of Columbia Circuit

January Term, 1949

No. 9769

CENTRAL ROIG REFINING COMPANY AND WESTERN SUGAR REFINING COMPANY, APPELLANT

v.

SECRETARY OF AGRICULTURE, APPELLEE

United States Court of Appeals for the District of Columbia Circuit. Filed Jan. 7, 1949. Joseph W. Stewart, Clerk.

Order

Upon consideration of appellee's motion for a further stay of issuance of the certified copy of the Court's opinion and judgment, presently stayed to and including December 24, 1948, to January 24, 1949, it is

Ordered by the Court that the Motion be, and is hereby, granted.
Per curiam.
Enter.

(S) STEPHENS, C. J.

DATED: JANUARY 7, 1949.

United States Court of Appeals for the District Court of Columbia Circuit

No. 9769

CENTRAL ROIG REFINING COMPANY AND WESTERN SUGAR REFINING COMPANY, APPELLANT

v.

SECRETARY OF AGRICULTURE, APPELLEE

United States Court of Appeals for the District of Columbia Circuit. Filed Jan. 19, 1949. Joseph W. Stewart, Clerk.

Motion for further stay of issuance of certified copy of opinion and judgment

Comes now the appellee by his attorney, the United States Attorney, and moves for a stay of the issuance of a certified copy of the Court's opinion and judgment, presently stayed to and including January 24, 1949, to and including February 23, 1949, for the reason that the appellee is considering a petition to the Supreme Court of the United States for a Writ of Certiorari.

(S) George Morris Fay,
GEORGE MORRIS FAY,
United States Attorney.
(S) John D. Lane,
JOHN D. LANE,
Assistant United States Attorney.

Certificate of service

I certify that service of the foregoing motion has been made upon the appellant and interveners by mailing a copy to their respective attorneys, this 19th day of January, 1949, addressed as follows: Abe Fortas and Thurman Arnold, Ring Building, Washington, D. C.; Walton H. Hamilton, 1200 18th Street NW., Washington, D. C.; Arthur L. Quinn, 1625 K Street NW., Washington, D. C.; Dean Acheson, 701 Union Trust Building, Washington, D. C.;

Orlando J. Antonsanti, P. O. Box 829, San Juan, Porto Rico; and Frederic P. Lee, 1200 18th Street NW., Washington, D. C.

(S) John D. Lane,
JOHN D. LANE,
Assistant United States Attorney.

United States Court of Appeals for the District of Columbia Circuit

January Term, 1949

No. 9769

CENTRAL ROIG REFINING CO. AND WESTERN SUGAR REFINING COMPANY, APPELLANTS

v.

SECRETARY OF AGRICULTURE, APPELLEE

Order

On consideration of appellee's motion to stay the issuance of certified copy of the opinion and judgment herein for 30 days pending application to the Supreme Court for allowance of a writ of certiorari, It is

Ordered by the Court that the issuance of a certified copy of the opinion and judgment herein be, and it is hereby, stayed to and including February 23, 1949.

Per curiam.

Enter.

(S) STEPHENS, C. J.

Dated February 4, 1949.

United States Court of Appeals for the District of Columbia Circuit. Filed Feb. 4, 1949. Joseph W. Stewart, Clerk.

In the United States Court of Appeals for the District of Columbia Circuit

No. 9769

CENTRAL ROIG REFINING CO. AND WESTERN SUGAR REFINING COMPANY, APPELLANTS

v.

SECRETARY OF AGRICULTURE, APPELLEE

PUERTO RICAN AMERICAN SUGAR REFINERY, INC., INTERVENOR

THE AMERICAN SUGAR REFINING COMPANY, ET AL., INTERVENORS

GOVERNMENT OF PUERTO RICO, INTERVENOR

United States Court of Appeals for the District of Columbia Circuit. Filed Feb. 7, 1949. Joseph W. Stewart, Clerk.

Designation of record

The Clerk will please prepare a certified transcript of record for use on petition for writ of certiorari to the Supreme Court of the United States in the above-entitled cause, and include therein the following:

1. Joint Appendix to Appellants' Brief.
2. Opinion filed November 24, 1948.
3. Judgment.
4. Motion to Stay Mandate, filed December 9, 1948.
5. Order Staying Issuance of Certified Copy of Court's Opinion and Judgment to and including December 24, 1948.
6. Motion for Further Stay of Issuance of Certified Copy of Opinion and Judgment to and including January 24, 1949, filed December 23, 1948.
7. Order entered January 7, 1949 granting motion.
8. Motion for Further Stay of Issuance of Certified Copy of Opinion and Judgment to and including February 23, 1949.
9. Order.
10. This Designation
11. Clerk's Certificate.

(S) Philip B. Perlman,
PHILIP B. PERLMAN,
Solicitor General,
Counsel for Appellee.

(S) Frederic P. Lee,
FREDERIC P. LEE,
Counsel for Appellants.

(S) Arthur L. Quinn,
ARTHUR L. QUINN,
Counsel for Intervenor,
Puerto Rican American Sugar Refinery, Inc.

(S) COVINGTON, BURLING, RUBLEE,
ACHESON & SHORB,
by H. C. WESTWOOD,
COVINGTON, BURLING, RUBLEE,
ACHESON & SHORB,
Counsel for Intervenors,
The American Sugar Refining Company, et al.

(S) ABE FORTAS,
ARNOLD, FORTAS & PORTER,
Counsel for Intervenor,
Government of Puerto Rico.

Dated February 8, 1949.

United States Court of Appeals for the District of Columbia Circuit

I, JOSEPH W. STEWART, Clerk of the United States Court of Appeals for the District of Columbia Circuit, formerly United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered 1 to 206, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties, and the proceedings of the said Court of Appeals as designated by counsel in the case of: Central Roig Refining Company and Western Sugar Refining Company, Appellants, v. Secretary of Agriculture, Appellee, Porto Rican American Sugar Refinery, Inc., Intervenor; The American Sugar Refining Company, et al., Intervenors; Government of Puerto Rico, Intervenor; No. 9769, January Term, 1949, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this eighth day of February, A. D. 1949.

[SEAL] (S) JOSEPH W. STEWART,
Clerk of the United States Court of Appeals
for the District of Columbia Circuit.

In the Supreme Court of the United States

October Term, 1948

No. ——

SECRETARY OF AGRICULTURE, PETITIONER

v.

CENTRAL ROIG REFINING COMPANY AND WESTERN SUGAR REFINING COMPANY, RESPONDENTS

PUERTO RICAN AMERICAN SUGAR REFINERY, INC., INTERVENOR

THE AMERICAN SUGAR REFINING COMPANY, ET AL., INTERVENORS

GOVERNMENT OF PUERTO RICO, INTERVENOR

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that:

1. For the purpose of the petition for a writ of certiorari and, in the event the petition be granted, for the purpose of hearing and determining the case on the merits, the printed record shall consist of the following:

(a) Joint Appendix to Appellants' Brief.

(b) The proceedings had before the United States Court of Appeals for the District of Columbia Circuit as set forth in the Designation of Record filed by the Petitioner.

2. Petitioner will cause the Clerk of the United States Court of Appeals for the District of Columbia Circuit to file with the Clerk of the United States Supreme Court the entire transcript of record in the United States Court of Appeals for the District of Columbia Circuit, and any of the parties may refer in their briefs and arguments to said transcript of record, including any part which has not been printed.

(S) Philip B. Perlman,
PHILIP B. PERLMAN,
Solicitor General,
Counsel for Petitioner.

(S) Frederic P. Lee,
FREDERIC P. LEE,
Counsel for Respondents.

(S) Arthur L. Quinn,
ARTHUR L. QUINN,
Counsel for Intervenor,
Puerto Rican American Sugar Refinery, Inc.

(S) COVINGTON, BURLING, RUBLEE,
ACHESON & SHORB,
by H. C. WESTWOOD,
COVINGTON, BURLING, RUBLEE,
ACHESON & SHORB,
Counsel for Intervenors,
The American Sugar Refining Company, et al.

(S) ABE FORTAS,
ARNOLD, FORTAS & PORTER,
Counsel for Intervenor,
Government of Puerto Rico.

U. S. GOVERNMENT PRINTING OFFICE: 1949

Supreme Court of the United States

No. 27—October Term, 1949

Order allowing certiorari

Filed April 25, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 580, Porto Rican American Sugar Refinery, Inc. vs. Central Roig Refining Co., for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 30—October Term, 1949

Order allowing certiorari

Filed April 25, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 575, Secretary of Agriculture vs. Central Roig Refining Co., for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 32—October Term, 1949

Order allowing certiorari

Filed April 25, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following Nos. 575 and 580, Secretary of Agriculture vs. Central Roig Refining Company, etc.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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U. S. GOVERNMENT PRINTING OFFICE: 1949

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 575

SECRETARY OF AGRICULTURE, PETITIONER

v.

CENTRAL ROIG REFINING COMPANY AND WESTERN SUGAR REFINING COMPANY, RESPONDENTS

PORTO RICAN AMERICAN SUGAR REFINERY, INC., INTERVENOR

THE AMERICAN SUGAR REFINING COMPANY, ET AL., INTERVENORS

GOVERNMENT OF PUERTO RICO, INTERVENOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled cause on November 24, 1948. The judgment reversed an order of the

Secretary of Agriculture allotting the direct-consumption portion of the 1948 sugar quota for Puerto Rico.

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 194-197) is not reported. The findings and order of the Secretary of Agriculture (Puerto Rico Sugar Order 18, R. 160-175) are reported in 13 F. R. 310-313.

JURISDICTION

The judgment of the Court of Appeals was entered on November 24, 1948 (R. 198). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED

When allotting a quota or proration thereof under the Sugar Act of 1948, is the Secretary of Agriculture required as a matter of law:

(1) To measure each allottee's ability to market by actual performance solely during the preceding year, when actual performance is used as the measure of ability?

(2) To measure the past marketings of each allottee by marketings during not more than the preceding six years, regardless of any abnormal conditions that may have existed during that period?

(3) To give some weight to each allottee's processing of sugar from sugarcane to which proportionate shares pertained, notwithstand-

ing the Secretary's consideration of the facts and his conclusion that in the interest of fairness and equity such processings should be given a zero weighting?

STATUTE AND ORDER INVOLVED

The statute involved is the Sugar Act of 1948 (61 Stat. 922-933, 7 U. S. C., Supp. I, 1100-1160). The Secretary of Agriculture is required by the Act to determine in December of each year the sugar consumption requirements of consumers in the continental United States for the following year, and to establish quotas for the several areas that supply those requirements. The Act itself fixes the quotas for the domestic sugar producing areas (which include the states, territories, and possessions) and for the Republic of the Philippines, and specifies the manner in which quotas for other foreign areas shall be computed.

In addition to these general sugar quotas, Section 207 of the Act limits the portion of the quota for each of several offshore areas (including Puerto Rico) that may be filled with direct-consumption sugar. Direct-consumption sugar is sugar that is not to be further refined or otherwise improved in quality; i.e., usually refined sugar. The balance of the quota may be filled only with raw sugar, which is then refined by the refiners in the continental United States.

The sections of the Act immediately involved are Section 207(b), which fixes the direct-consump-

tion portion of the quota for Puerto Rico at 126,033 short tons, raw value, and Section 205(a), which authorizes the Secretary to allot any quota or proration thereof to the persons who market or import sugar from the area, and specifies the factors to be taken into consideration when making the allotment. The sections are as follows:

> Sec. 207 (b). Not more than one hundred and twenty-six thousand and thirty-three short tons, raw value, of the quota for Puerto Rico for any calendar year may be filled by direct-consumption sugar.
>
> Sec. 205 (a). Whenever the Secretary finds that the allotment of any quota, or proration thereof, established for any area pursuant to the provisions of this Act, is necessary to assure an orderly and adequate flow of sugar or liquid sugar in the channels of interstate or foreign commerce, or to prevent disorderly marketing or importation of sugar or liquid sugar, or to maintain a continuous and stable supply of sugar or liquid sugar, or to afford all interested persons an equitable opportunity to market sugar or liquid sugar within any area's quota, after such hearing and upon such notice as he may by regulations prescribe, he shall make allotments of such quota or proration thereof by allotting to persons who market or import sugar or liquid sugar, for such periods as he may designate, the quantities of sugar or liquid sugar which each such person may market in continental United States, the Territory of Hawaii, or

Puerto Rico, or may import or bring into continental United States, for consumption therein. Allotments shall be made in such manner and in such amounts as to provide a fair, efficient, and equitable distribution of such quota or proration thereof, by taking into consideration the processings of sugar or liquid sugar from sugar beets or sugarcane to which proportionate shares, determined pursuant to the provisions of subsection (b) of section 302, pertained; the past marketings or importations of each such person; and the ability of such person to market or import that portion of such quota or proration thereof allotted to him. The Secretary may also, upon such hearing and notice as he may by regulations prescribe, revise or amend any such allotment upon the same basis as the initial allotment was made.

No sugar from an area may be imported or marketed in the continental United States in excess of the quota for the area or in excess of any allotment of a quota or part thereof (Sec. 209, 7 U. S. C., Supp. I, 1119).

The administrative order involved is Puerto Rico Sugar Order 18 (13 F. R. 310-313), which is set forth in full in the record (R. 160-175). It allots the direct-consumption portion of the 1948 sugar quota for Puerto Rico.

STATEMENT

Puerto Rico Sugar Order 18 was issued by the Secretary after a public hearing. The Secretary first determined that the allotment was necessary

in order to prevent disorderly marketing and to afford all interested persons an equitable opportunity to market, and he gave notice of a public hearing to receive evidence to enable him to make a fair, efficient, and equitable distribution of the quota (R. 161-162). At the hearing, the Department of Agriculture proposed an allotment formula for purposes of discussion, and evidence was received regarding that and other proposals (R. 162-168, 2-159). The respondents actively participated in the hearing. Upon the basis of the hearing record, the Secretary formulated and issued his decision and order (R. 160-175).

The decision contains findings regarding the need for making the allotment (R. 171-174), and a summary of the evidence bearing upon the manner in which the allotment should be made (R. 162-168). It also contains a detailed discussion of the three statutory standards that must be considered when making an allotment, and an explanation of the reasons governing the Secretary's choice of the method of allotment used (R. 168-171).

With respect to the factor "past marketings" the Secretary recognized that "ordinarily the most recent period of marketings recommends itself as reasonable" (R. 169). As a result of the war, however, the period from 1942 through October 1947 was one "of great abnormality"; during this period there was governmental control of both imports and exports of sugar and many difficulties

were experienced in transportation, storage and the obtaining of essential materials which affected different refiners in varying degrees (R. 169-170). In view of these facts, the Secretary concluded "that the past six years are not representative years for past marketings and should not be used", and that the pre-war years, 1935-1941, inclusive, were to be regarded as representative. For the benefit of refiners who did not operate in all those seven years, the Secretary found that "the use of each refiner's average of the highest five years of marketings during such seven-year period will afford a fair and equitable measure of past marketings" (R. 170). A similar analysis was made in the application of the factor of "ability to market". The Secretary there, too, recognized that "under normal circumstances the selection of a recent year to measure ability would seem reasonable," but that the abnormality of the preceding six years made their use as the sole measure of the ability of all Puerto Rican refineries unfair and inaccurate. Accordingly, the Secretary thought it fair to use the highest of any war or pre-war year since 1935 as a measure of the present marketing ability of each refiner, subject to using present plant capacity as a check on current ability to market (R. 170-171). The Secretary considered the standard of "processings of sugar * * * from * * * sugarcane to which proportionate shares * * * pertained" and found it not applicable to

the direct consumption portion of Puerto Rican sugar quota, since it referred to processings of raw sugar from sugarcane and not to the processings of refined sugar from raw sugar, and because the three largest Puerto Rican refiners (the competing parties in the instant case) do not process raw sugar from sugarcane (R. 168).

In conclusion the Secretary prescribed the formula in making the allotment based upon the foregoing, as follows (R. 174):

> I hereby determine and conclude . . . that in order to make a fair, efficient, and equitable distribution of the direct-consumption portion of such quota, as required by section 205(a) of the act, allotments should be made by giving equal weight to (a) past marketings, measured by the average of the highest five years of such marketings by each refiner during the period 1935-1941, inclusive, and (b) ability to market, measured by the highest single year's marketings during the period 1935-1947, inclusive . . .

Respondents Central Roig Refining Company and Western Sugar Refining Company, two of the three largest refiners in Puerto Rico, appealed from the order of the Secretary to the United States Court of Appeals for the District of Columbia in accordance with the procedure specified in Section 205 of the Act. They challenged the validity of the order on two grounds. They contended: (1) That the order itself is invalid under

the terms of Section 205(a) of the Act because the Secretary erroneously interpreted and arbitrarily and capriciously applied the statutory standards required to be considered when making allotments, and (2) that the statutory limitation in Section 207(b) on the portion of the general Puerto Rican sugar quota that may be marketed in the continental United States in refined form is grossly discriminatory against Puerto Rican refiners and is therefore invalid under the due process clause of the Fifth Amendment.

Porto Rican American Sugar Refinery, Inc., the largest of the Puerto Rican refiners, intervened for the purpose of defending the Secretary's order against the attack on statutory grounds.[1] The American Sugar Refining Company and other continental refiners of sugarcane intervened for the purpose of defending the order against the attack on constitutional grounds. The Government of Puerto Rico intervened for the purpose of attacking the constitutionality of the statutory restriction.

The Court of Appeals for the District of Columbia reversed the Secretary's order on the basis of its conclusion that, as a matter of law, none of the three statutory standards had been properly interpreted and applied.

The court's decision is based upon its interpre-

[1] The remaining three refiners that received small allotments under the Secretary's order did not become parties to the action.

tation of the statutory standards themselves, and not upon a review of the record to determine whether the Secretary's judgment on the facts was arbitrarily or capriciously exercised.[2] Judicial review is limited by the Act to questions of law, and the Secretary's findings of fact, if supported by substantial evidence, are made final unless they are shown to be clearly arbitrary or capricious. Because the court reversed the Secretary's order on statutory grounds, it refrained from deciding whether Section 207(b), which imposes the limitation upon the portion of the Puerto Rican sugar quota that may be filled with direct-consumption sugar, is authorized by the Constitution. Judge Edgerton dissented from this aspect of the court's opinion, and expressed the view that the constitutional question should have been decided.

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred:

(1) In holding, as a matter of law, that an allottee's ability to market the portion of the quota allotted to him may not be measured by actual performance more remote than performance during the preceding year;

[2] In its factual statement the court characterized the order as "very favorable" to one of the intervenors. The characterization is unjustified because the court did not purport to review the evidence to determine whether the Secretary made a fair and equitable distribution of the quota. Without such review it is impossible to determine whether the order is favorable or unfavorable to anyone.

(2) In holding, as a matter of law, that it is doubtful whether the statutory standard "past marketings" includes marketings for more than the last half dozen years, and that marketings during the six wartime years 1942-1947 may not be excluded from consideration regardless of the abnormal conditions that prevailed;

(3) In holding, as a matter of law, that the statutory standard "processings of sugar from sugarcane to which proportionate shares pertained" must be given some weight, notwithstanding the conclusion of the Secretary that the standard is inapplicable to the situation in Puerto Rico, and that in the interest of fairness and equity (which is the controlling statutory guide) the standard should be given a zero weighting;

(4) In reversing the order of the Secretary.

REASONS FOR GRANTING THE WRIT

1. The Government submits that the court below has misconstrued the statutory standards that must be considered by the Secretary when allotting a quota or portion thereof under the Sugar Act of 1948. The controlling statutory guide is that an allotment shall be made "in such manner and in such amounts as to provide a fair, efficient, and equitable distribution" of the quota. The Act directs the Secretary to reach that result "by taking into consideration" three specific standards. The

controlling guide, however, remains a fair, efficient and equitable distribution.

(a) The Secretary considered the specific standard "ability to market" and concluded that the present ability of each allottee could best be measured by its actual performance in the past rather than by its present plant capacity, inventory of raw sugar supplies, marketing outlets, or other comparable factors. Those factors represent only a potential or hypothetical ability to market sugar, while actual performance shows a demonstrated ability. Plant capacity, however, was used as a check on the accuracy of the measurement. That is, the Secretary concluded that demonstrated ability in the past would be taken as a reliable measure of present ability if it was within the limits of present plant capacity. In view of the disruptive effect of the war on the marketing of sugar, the Secretary also concluded that it would be fair to use the best single year's performance of each refiner during the preceding thirteen years, subject to the limitation regarding present plant capacity. In recognizing the abnormal situation created by the war, the Secretary followed a practice the Department of Agriculture has followed consistently in the administration of other quota programs—the practice of making allowances for non-typical years due to a major crop failure, fire, drought, hurricane, or comparable factor.

The Court of Appeals held that actual perform-

ance is a permissible measure of ability to market,[3] but that as a matter of law the only performance that may be considered is performance during the preceding year, regardless of any abnormal situation that may have prevailed then. The court said that performance during twelve of the thirteen years permitted to be considered by the order under review had nothing to do with ability to market in 1948, and that under the terms of the Act the only performance that may be used as a measure of ability is current performance, meaning performance during the preceding year.

The court's interpretation of the statute is clearly erroneous. The meaning of the statutory standard is plain. The only issue presented is the reasonableness of the method used by the Secretary to measure ability to market. The reasonableness of the method depends upon the facts, and the court did not consider the facts. It concluded, as a matter of law, that regardless of the facts ability to market may not be measured by actual performance more remote than performance during the preceding year. The court did not say that the Secretary had acted arbitrarily in allowing ability to be measured by performance during a particular year prior to 1947. It said that as a matter of law the act does not permit ability to be measured by performance during

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[3] See statements of the same court to the same effect in *Gay Union Corp.* v. *Wallace*, 71 App. D.C. 382, 112 F. 2d 192, 197, 199, certiorari denied, 310 U.S. 647, a case arising under the Sugar Act of 1937.

any such prior year. It is submitted that there is no basis for that conclusion. If for any reason performance figures for the preceding year are not a fair measure of ability, there is no rational basis for the conclusion that performance figures for an earlier year may not be used. Whether such figures should be used is a matter of judgment for determination by the Secretary, and not a matter of law unless the Secretary's action is shown to be clearly arbitrary or capricious.

(b) The Secretary considered the standard "past marketings", and concluded that the past marketings of each refiner should be measured by the average of its highest marketings during five of the seven years in the prewar period 1935-1941. Marketings during the war years were excluded from the measure because the abnormal marketing conditions that prevailed made them an inappropriate base for a fair and equitable allotment, which is the controlling statutory requirement.

The court below held that in excluding marketings during the war years the Secretary failed to comply with the Act, that the prewar marketings considered by him were no measure of past marketings, and that it is doubtful whether the Act permits a consideration of marketings for more than the preceding half dozen years.

The Act is not properly subject to that interpretation. It prescribes no fixed period to be used by the Secretary when considering past marketings,

and the court may not properly read into it a six-year limitation. In other quota legislation, when Congress has intended that marketings for a fixed period be considered it has said so.[4]

Similarly, the Act does not require the most recent past marketings to be included if there is good reason for excluding them. The Secretary is directed in general terms to make a fair and equitable allotment by considering past marketings. No particular period of past marketing is specified, and the period selected for consideration must be one that will allow the Secretary to arrive at the equitable result required by the Act. In other legislation involving the allotment of quotas for agricultural products the Secretary is specifically required when considering past marketings and past production to make due allowances for abnormal weather conditions.[5] The general and

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[4] In the Agricultural Adjustment Act of 1938, Congress has provided that the national marketing quota for tobacco shall be apportioned among the states on the basis of the total production of tobacco in each state during the five years immediately preceding the year in which the quota is proclaimed (52 Stat. 47, 7 U.S.C. 1313(a)). Similar provision has been made for the apportionment of marketing quotas at the state or county level for corn, wheat, cotton, rice, and peanuts (52 Stat. 52, 7 U.S.C. 1329(a); 52 Stat. 53-54, 7 U.S.C. 1334(a)(b); 52 Stat. 57, 7 U.S.C. 1344(a)(c); 52 Stat. 61, 7 U.S.C. 1353(a); 55 Stat. 89, 7 U.S.C. 1358(c)). In contrast, the act requires some allotments at the farm level to be based in part on past marketings, but the period to be considered is not specified (52 Stat. 47, 7 U.S.C. 1313(b); 52 Stat. 61, 7 U.S.C. 1353(b); 55 Stat. 89, 7 U.S.C. 1358(d)).

[5] Agricultural Adjustment Act of 1938, 52 Stat. 31, 7 U.S.C. 128, *et seq.*, secs. 313, 329, 334, 344, 353, 358.

unrestricted language of the Sugar Act should not be construed to preclude the Secretary from making similar allowances when alloting sugar quotas.

The prewar marketings considered by the Secretary clearly were past marketings. Their use and the exclusion of the war years as a basis for the allotment was a matter of judgment rather than statutory power, and the Secretary's judgment should not be set aside unless it is shown to be arbitrary or capricious.

(c) The third standard is "processings of sugar . . . from . . . sugarcane to which proportionate shares . . . pertained." Such sugarcane is sugarcane produced within the limits of individual farm allotments; that is, it is each farm's proportionate share of the sugarcane needed to be produced to fill the quota for the area. Title III of the Act authorizes the Secretary to make conditional payments to producers who, among other things, do not market sugarcane in excess of their proportionate shares. The direction to the Secretary to consider processings from proportionate share sugarcane when allotting the quota for an area is designed to supplement the farm allotment program by encouraging processors to restrict their processing activities to proportionate share sugarcane.

The Secretary considered this standard and concluded that it was not applicable to the particular facts involved in making the Puerto Rican allot-

ment, and that it should therefore be given a zero weighting. It was regarded as inapplicable because the refiners of more than 90% of the sugar used to fill the quota (including the two respondents) did not process sugar from proportionate share sugarcane, and any weight given to a factor that applied only to refiners of less than 10% of the sugar would not produce an equitable result.

The Court of Appeals held that these facts might warrant giving slight weight to the standard, but that as a matter of law the Secretary is required to give some weight to it.

It is submitted that this interpretation is also erroneous. The Act requires only that the Secretary make a fair, efficient, and equitable distribution of the quota "by taking into consideration" the three specific standards, and the Secretary explicitly gave consideration to this factor in the instant case. The Act says only that he shall consider the three standards; it does not say how much weight, if any, he shall give to each of them. If the Secretary determines, after considering all the facts, that a fair and equitable allotment requires a zero weighting to be given to processings of sugar from proportionate share sugarcane, there is nothing in the language of the Act that justifies a conclusion that he must nevertheless give a nominal weight to the standard. The Act makes no more distinction between zero and a nominal weighting of one percent, if supported by substantial evi-

dence, than it does between a 49% and 50% weighting.

The error of the court's interpretation may be illustrated by an hypothetical example. The Act provides for the allotment of different kinds of quotas for different areas, both domestic and foreign. The same statutory standards, however, govern the making of all allotments. If a quota for a foreign area, e.g., Cuba, should be allotted to the importers of sugar from the area, as the Act authorizes, it would be impossible to give this particular factor any affirmative weight. The Act does not provide for the assignment of proportionate shares to individual farms in Cuba. Consequently, no importer-allottee could be a processor of proportionate share sugarcane grown in Cuba, and the standard would of necessity be given a zero weighting.

Thus, the Act cannot be interpreted to require, as a matter of law, that some weight be given to the standard under all circumstances. Whether the Secretary was warranted in giving no weight to it in the order under review depends upon the particular circumstances involved, a factor which the court below did not consider.

2. The interpretation of the statutory standards governing the Secretary's allocations under the Sugar Act presents a question of public importance which has not been, but should be, passed upon by

this Court. *Federal Security Administration* v. *Quaker Oats Co.*, 318 U. S. 218; *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607. The opinion of the court below overturned the Secretary's order, not merely because of factors peculiar to the instant case, but as a result of a pervasive construction of the standards laid down by the statute for the Secretary's guidance. The construction ascribes rigid and inflexible qualities to the statutory standards. The Secretary believes that administration of the sugar program in accordance with that construction will result in serious inequities.

The effect of the court's opinion is of wide scope since it extends to the allotment of any quota and is controlling in the variety of circumstances that will confront the Secretary when allotting quotas for different producing areas. The Act provides for the allotment of a quota or proration thereof for any area supplying the needs of consumers of sugar in the continental United States, and it also provides for the allotment of quotas limiting the amounts of sugar that may be marketed for local consumption in the Territory of Hawaii and in Puerto Rico. The same statutory standards are applicable to all these allotments.[8]

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[8] The Secretary has issued an announcement of public hearings for the purpose of allotting for 1949 the general Puerto Rican quota for consumption in the United States, the direct-

The Act is concerned with sugar produced from sugarcane and sugar beets. The marketings of such sugar are necessarily limited by the availability of sugarcane and sugar beets for its production. Sugarcane and sugar beet production are subject to many recurring weather and other natural hazards. Rarely do such hazards affect all portions of a producing area alike. Growers in some localities of a producing area will suffer crop failures while those in other localities in the same area will produce bumper crops. Occasionally, the production

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consumption portion of that quota, and the quota for local consumption (14 F.R. 80).

The following allotments under the Sugar Act of 1937 show the frequency with which quotas have been allotted and the different areas to which the quotas apply:

Area	*Quota Allotted*	*Citation*
Domestic Beet Sugar Area	1939	4 F. R. 1742
	1940	5 F. R. 1187
	1941	6 F. R. 2363
Mainland Cane Sugar Area	1939	4 F. R. 1744
	1940	5 F. R. 1598, 5232
	1941	6 F. R. 2497
Puerto Rico (General quota for consumption in the United States)	1937	2 F. R. 1966, 2914
	1938	3 F. R. 1474, 2885
	1939	4 F. R. 1642, 1739
	1940	5 F. R. 1377, 2398
	1941	6 F. R. 2410
Puerto Rico (direct-consumption portion of quota for consumption in United States)	1938	3 F. R. 665, 786, 1077, 2785
	1939	4 F. R. 97
	1941	5 F. R. 4748
Puerto Rico (quota for local consumption)	1938	3 F. R. 1474
	1939	4 F. R. 1642, 1739
	1940	5 F. R. 1377, 2398
	1941	6 F. R. 2410

in an entire area will be affected by hurricane, drought, or other production hazard. When growers of sugarcane and sugar beets experience crop losses, those losses are reflected in reduced sugar marketings by the processors situated in the locality where the losses occur.

When alloting a quota, there are times when the only reliable and equitable measure of "ability to market" is actual marketing performance. However, if the Secretary is required to use the previous year's marketings as the measure of such performance the results will be inequitable when the marketings of some processors are reduced by a crop failure or comparable hazard. This measure of ability will then not only result in inequities between processors, but it will also adversely affect growers who normally sell their sugarcane and sugar beets to the processors so affected. If a processor is unable to sell the sugar, there is no incentive for him to buy the sugarcane and sugar beets from the grower. As sugarcane and sugar beets are principally valuable only to processors who can convert them into sugar, the injury to growers is apparent.[7]

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[7] In allotting the 1941 sugar quota for the mainland cane sugar area, the Secretary of Agriculture pointed out this relationship as follows 6 F.R. 2499:

> The act contemplates a method of allotment which will, in addition to providing a fair, efficient, and equitable distribution of the quota, afford protection to producers of sugarcane.

For similar reasons, the use of years of abnormal production when measuring "past marketings" may also result in inequities between processors and hardship to growers. As past marketings are usually measured by marketings for a period of three or more years, the degree of injury may be lessened by the inclusion of both normal and abnormal crop years. However, if a succession of crop failures should occur in the same locality the inequities resulting from the court's opinion would be intensified.

The opinion of the court below may also result in hardship when proportionate shares (acreage allotments) for farms are established under Section 302(b) of the act. That section provides that proportionate shares shall be established on the basis of past production on the farm and ability to produce sugarcane or sugar beets thereon. Frequently, the best measure of ability to produce sugarcane or sugar beets is the actual performance record of the farm. As the language of Section 302(b) and Section 205(a) is substantially the same insofar as the factors of past performance and ability are concerned, the opinion of the court may embarrass the Secretary in the establishment of proportionate shares for farms. If the previous year's production on the farm must be used as the measure of ability to produce sugarcane or sugar beets, it is apparent that great hardship will result to growers who suffered crop failures during that year. Hard-

ship may also result if any year in which a crop failure occurred is required to be used in the measurement of past production on the farm.

In view of the similarity between the language in Section 302(b) relating to the establishment of proportionate shares for farms and the language of Section 205(a) relating to allotments to processors, the following statement by the House Committee on Agriculture in regard to the language of Section 302(b) is significant.[8]

> In view of the differences in conditions of production obtaining in the various sugar-producing areas, the committee has not attempted to specify the exact manner in which the Secretary shall use production history. It is the judgment of the committee that considerable discretion should be left to the Secretary to deal with the varied and changing conditions in the various producing areas, in order to establish fair and equitable proportionate shares for farms in such areas.

It is the opinion of the Secretary of Agriculture that it will be extremely difficult to make future allotments in a manner that will carry out the congressional mandate to make a fair, efficient, and equitable distribution of a quota if the court's interpretation of the statutory standards is not reversed. The rigid mold into which the court has forced the standards will leave little room for the

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[8] H. Rep. No. 796, 80th Cong., 1st Sess. p. 8.

exercise of judgment by the Secretary and little discretion to deal with the varied and changing conditions in the several sugar-producing areas. The objectives of the entire statutory plan will be impaired.

3. The controversy is not moot. Although the order relates only to the marketing of sugar during the year 1948, the order was in effect throughout the year and a determination of its validity is essential to the future collection of penalties for past violations of the order, if any (Sec. 405 of the Act). Moreover, when determining the validity of an allotment order under the earlier Sugar Act of 1937, after the allotment period had expired, the Court of Appeals for the District of Columbia Circuit pointed out that the probability of the issuance of a new order for the following year and the improbability of obtaining judicial review of the new order before the expiration of the allotment period prevented the case from being moot. "A case" is "never moot in a situation in which there is the necessity of deciding a question of law to serve as a guide to the body called upon to act again in the same matter." *Gay Union Corp.* v. *Wallace*, 71 App. D. C. 382, 112 F. 2d 192, 195, certiorari denied, 310 U. S. 647. See also *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 515-16; *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 413-14.

4. The case involves an important constitutional issue. The respondents contended in the court below that the order under review is invalid because the section of the Act fixing the portion of the quota allotted by the order is itself invalid. They contended that the limitation in Section 207 of the Act on the amount of the quota for Puerto Rico that may be filled with refined sugar is grossly discriminatory against Puerto Rican refiners and deprives them of property without due process of law in violation of the Fifth Amendment of the Constitution. The issue involves the power of Congress to regulate commerce between a territory and the states and the applicability of the due process clause to such regulation. The issue was fully argued and briefed but was not decided by the court below because the order was set aside on other grounds. If the Government's contention that the Secretary of Agriculture properly interpreted and applied the statutory standards governing allotments is correct, the constitutional issue will need to be decided.

CONCLUSION

Wherefore, it is respectfully submitted that the petition for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit should be granted.

PHILIP B. PERLMAN,
Solicitor General.

FEBRUARY, 1949.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 27

SECRETARY OF AGRICULTURE, PETITIONER

v.

CENTRAL ROIG REFINING COMPANY AND WESTERN SUGAR REFINING COMPANY, RESPONDENTS; PORTO RICAN AMERICAN SUGAR REFINERY, INC., INTERVENOR; THE AMERICAN SUGAR REFINING COMPANY, ET AL., INTERVENORS; AND THE GOVERNMENT OF PUERTO RICO, INTERVENOR

No. 30

PORTO RICAN AMERICAN SUGAR REFINERY, INC., PETITIONER

v.

CENTRAL ROIG REFINING COMPANY AND WESTERN SUGAR REFINING COMPANY, RESPONDENTS

No. 32

THE GOVERNMENT OF PUERTO RICO, PETITIONER

v.

THE SECRETARY OF AGRICULTURE, PORTO RICAN AMERICAN SUGAR REFINERY, INC., THE AMERICAN SUGAR REFINING COMPANY, ET AL., CENTRAL ROIG REFINING COMPANY, AND WESTERN SUGAR REFINING COMPANY, RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF AGRICULTURE

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 194-197) is reported

in 171 F. 2d 1016. The findings and order of the Secretary of Agriculture (Puerto Rico Sugar Order 18, R. 160-175) are reported in 13 F. R. 310-313.

JURISDICTION

The judgment of the Court of Appeals was entered on November 24, 1948 (R. 198). Petitions for writs of certiorari were filed on February 18, 1949, and February 21, 1949, and were granted on April 25, 1949 (R. 208). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED

(1) Did the Secretary of Agriculture properly interpret and apply the statutory standards prescribed by the Sugar Act of 1948 when he allotted the direct-consumption portion of the general sugar quota for Puerto Rico that could be marketed in the continental United States in 1948?

(2) Does the statutory limitation on the portion of the general sugar quota for Puerto Rico that may be filled with direct-consumption sugar violate the due process clause of the Fifth Amendment to the Constitution?

STATUTE AND ORDER INVOLVED

The statute involved is the Sugar Act of 1948 (61 Stat. 922-933, 7 U. S. C., Supp. II, 1100-1160). The Secretary of Agriculture is required by the Act to determine in December of each year the

sugar consumption requirements of consumers in the continental United States for the following year, and to establish marketing quotas for the several areas that supply those requirements. The Act itself fixes the quotas for the domestic sugar-producing areas (which include two groups of states, and three territories and possessions) and for the Republic of the Philippines at figures totaling 5,250,000 short tons, raw value. The difference between that total and the estimated annual consumption requirements is assigned to other foreign areas, with Cuba getting 98.64 percent of it.

In addition to these general sugar quotas, section 207 of the Act (7 U. S. C. Supp. II, 1117) limits the portion of the marketing quota for each of the principal offshore areas (Hawaii, Puerto Rico, the Virgin Islands, the Republic of the Philippines, and Cuba) that may be filled with direct-consumption sugar. Direct-consumption sugar is sugar that is not to be further refined or otherwise improved in quality; i.e., usually refined sugar. The balance of the quota may be filled only with raw sugar, which is then refined by the refiners in the continental United States.

The sections of the Act immediately involved are section 207(b) (7 U. S. C., Supp. II, 1117(b)), which fixes the direct-consumption portion of the quota for Puerto Rico at 126,033 short tons, raw value, and section 205(a) (7 U. S. C., Supp. II, 1115(a)), which authorizes the Secretary to allot

any quota or proration thereof to the persons who market or import sugar from the area, and specifies the factors to be taken into consideration when making the allotment. Section 205(a) is not restricted in its application to the allotment of the quota for Puerto Rico. The standards specified in the section also govern the allotment of a quota for any other area. The sections are as follows:

> Sec. 207 (b). Not more than one hundred and twenty-six thousand and thirty-three short tons, raw value, of the quota for Puerto Rico for any calendar year may be filled by direct-consumption sugar.
>
> Sec. 205 (a). Whenever the Secretary finds that the allotment of any quota, or proration thereof, established for any area pursuant to the provisions of this Act, is necessary to assure an orderly and adequate flow of sugar or liquid sugar in the channels of interstate or foreign commerce, or to prevent disorderly marketing or importation of sugar or liquid sugar, or to maintain a continuous and stable supply of sugar or liquid sugar, or to afford all interested persons an equitable opportunity to market sugar or liquid sugar within any area's quota, after such hearing and upon such notice as he may by regulations prescribe, he shall make allotments of such quota or proration thereof by allotting to persons who market or import sugar or liquid sugar, for such periods as he may designate, the quantities of sugar or liquid sugar which each such

person may market in continental United States, the Territory of Hawaii, or Puerto Rico, or may import or bring into continental United States, for consumption therein. Allotments shall be made in such manner and in such amounts as to provide a fair, efficient, and equitable distribution of such quota or proration thereof, by taking into consideration the processings of sugar or liquid sugar from sugar beets or sugarcane to which proportionate shares, determined pursuant to the provisions of subsection (b) of section 302, pertained, the past marketings or importations of each such person; and the ability of such person to market or import that portion of such quota or proration thereof allotted to him. The Secretary may also, upon such hearing and notice as he may by regulations prescribe, revise or amend any such allotment upon the same basis as the initial allotment was made.

No sugar from an area may be imported into or marketed in the continental United States in excess of the quota for the area or in excess of any allotment of a quota or part thereof (Sec. 209, 7 U. S. C., Supp. II, 1119).

The administrative order involved is Puerto Rico Sugar Order 18 (13 F. R. 310-313), which is set forth in full in the record (R. 160-175). It allots the direct-consumption portion of the 1948 sugar quota for Puerto Rico.

THE SUGAR INDUSTRY

The Sugar Act of 1948 and its predecessors, the Sugar Act of 1937 and the Jones-Costigan Act of 1934, followed a period of high protective tariffs. All were designed to protect the American sugar industry from the effects of a world surplus of sugar that has existed for many years. The quotas imposed by the Sugar Act are an attempt to divide equitably among all areas of supply, both domestic and foreign, the market for sugar in the United States, and at the same time to establish prices at a level that is fair to the sugar industry and to consumers.

There are five domestic sugar-producing areas: two in the continental United States and one in each of the territories of Hawaii, Puerto Rico, and the Virgin Islands. The principal foreign sugar-producing areas are Cuba and the Republic of the Philippines; only a small quantity of sugar is imported from other foreign countries.

All the beet sugar sold in this country is grown and processed in the domestic beet sugar area, which is in the western part of the country. The sugar beets are converted into sugar by a continuous process, and the quota for the area is an effective limitation upon both the producers and the processors of the sugar beets. In contrast, most of the cane sugar sold in this country is produced in offshore areas, including the three domestic areas in the territories; only a very small proportion of it comes from the mainland cane sugar area, which

consists of Florida and Louisiana. Moreover, sugarcane is converted into refined sugar in two distinct and usually separate processes. The cane is processed into raw sugar by raw sugar mills located near the place of production, and the bulk of the raw sugar is later refined by refiners, some of whom are located in the offshore areas, but many of whom are located on the mainland. The mainland refiners obtain most of their supplies of raw sugar from offshore areas and refine it here. The refiners in the southern part of the country supplement those supplies with the raw sugar produced in the mainland cane sugar area.

A quota system, limiting in the interest of American producers the total quantity of sugar that may be marketed from various areas of supply, necessarily limits the raw sugar supplies available to refiners located on the mainland. To the extent the raw sugar is refined before it is marketed in the continental United States the problem of the mainland refiners is intensified. Refiners in offshore areas customarily market sugar at lower prices than the mainland refiners, and unless restricted by the quota system they would be able to pre-empt the major portion of the restricted raw sugar supplies. In order to meet the problem thus created, the Sugar Act limits the portions of the quotas for the offshore areas that may be filled with sugar that is not to be further refined on the mainland, called direct-consumption sugar, thus insuring the mainland refiners a portion of the raw

sugar supply subject to the general sugar quota limitations.

In order to implement the marketing quota provisions of the Act, provision is made for limiting the production of sugar in the domestic areas (both continental and offshore) to the quantities necessary to fill the respective marketing quotas, plus a normal carry-over. The limitation is accomplished by restricting each farm's marketings to its proportionate share of such quantities. This limitation is effective because it must be complied with in order to receive the Sugar Act payments authorized by Title III. The processings of sugar from sugarcane to which such proportionate shares pertained is one of the standards to be considered by the Secretary when allotting any quota among the persons who market sugar from the area.

In Puerto Rico, the refiners who market 90 percent of the sugar refined in the islands do not themselves process raw sugar from sugarcane. They buy their supplies of raw sugar from raw sugar mills. Some of the mills are "affiliated" with particular refiners in the sense that they are owned by the same interests, but the raw mills and the refiners are separate legal entities.

STATEMENT

Puerto Rico Sugar Order 18 was issued by the Secretary after a public hearing. The Secretary first determined that the allotment was necessary

in order to prevent disorderly marketing and to afford all interested persons an equitable opportunity to market, and he gave notice of a public hearing to receive evidence to enable him to make a fair, efficient, and equitable distribution of the quota (R. 161-162). At the hearing, the Department of Agriculture proposed an allotment formula for purposes of discussion, and evidence was received regarding that and other proposals (R. 162-168, 2-159). The respondents actively participated in the hearing. Upon the basis of the hearing record, the Secretary formulated and issued his decision and order (R. 160-175).

The decision contains findings regarding the need for making the allotment (R. 171-174), and a summary of the evidence bearing upon the manner in which the allotment should be made (R. 162-168). It also contains a detailed discussion of the three statutory standards that must be considered when making an allotment, and an explanation of the reasons for the Secretary's choice of the method of allotment used (R. 168-171).

With respect to the standard of "past marketings," the Secretary recognized that "ordinarily the most recent period of marketings recommends itself as reasonable" (R. 169). As a result of the war, however, the period from 1942 through October 1947 was one "of great abnormality"; during this period there was governmental control of both imports and exports of sugar and many difficulties were experienced in transportation, storage, and

the obtaining of essential materials which affected the refiners in varying degrees (R. 169-170). In view of these facts, the Secretary concluded "that the past six years are not representative years for past marketings and should not be used," and that the prewar years, 1935-1941, inclusive, were to be regarded as representative. For the benefit of refiners who did not operate in all those seven years, the Secretary found that "the use of each refiner's average of the highest five years of marketings during such seven-year period will afford a fair and equitable measure of past marketings" (R. 170).

A similar analysis was made in the application of the standard of "ability to market." The Secretary there, too, recognized that "under normal circumstances the selection of a recent year to measure ability would seem reasonable," but that the abnormality of the preceding six years made their use as the sole measure of the ability of all Puerto Rican refineries unfair and inaccurate. Accordingly, the Secretary thought it fair to use the highest of any war or prewar year since 1935 as a measure of the present marketing ability of each refiner, subject to using present plant capacity as a check on current ability to market (R. 170-171).

The Secretary considered the standard of "processings of sugar * * * from * * * sugarcane to which proportionate shares * * * pertained," and found it not applicable to the allotment of the

direct-consumption portion of Puerto Rican sugar quota, because it referred to processings of raw sugar from sugarcane and not to processings of refined sugar from raw sugar, and the three largest Puerto Rican refiners (which are parties in the instant case) do not process raw sugar from sugarcane (R. 168).

In conclusion the Secretary prescribed the formula in making the allotment based upon the foregoing, as follows (R. 174):

> I hereby determine and conclude * * * that in order to make a fair, efficient, and equitable distribution of the direct-consumption portion of such quota, as required by section 205(a) of the act, allotments should be made by giving equal weight to (a) past marketings, measured by the average of the highest five years of such marketings by each refiner during the period 1935-1941, inclusive, and (b) ability to market, measured by the highest single year's marketings during the period 1935-1947, inclusive * * *.

Respondents Central Roig Refining Company and Western Sugar Refining Company, two of the three largest refiners in Puerto Rico, appealed from the order of the Secretary to the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedure specified in section 205 of the Act. They challenged the validity of the order on two grounds. They con-

tended (1) that the order itself is invalid under the terms of section 205(a) of the Act because the Secretary erroneously interpreted and arbitrarily and capriciously applied the statutory standards required to be considered when making allotments, and (2) that the statutory limitation in section 207(b) on the portion of the general Puerto Rican sugar quota that may be marketed in the continental United States in refined form is grossly discriminatory against Puerto Rican refiners and is, therefore, invalid under the due process clause of the Fifth Amendment.

Porto Rican American Sugar Refinery, Inc., the petitioner in No. 30 and the largest of the Puerto Rican refiners, intervened for the purpose of defending the Secretary's order against the attack on statutory grounds.[1] The American Sugar Refining Company and other continental refiners of raw cane sugar intervened for the purpose of defending the order against the attack on constitutional grounds. The Government of Puerto Rico, the petitioner in No. 32, intervened for the purpose of attacking the constitutionality of the statutory restriction.

The Court of Appeals for the District of Columbia Circuit reversed the Secretary's order on the basis of the court's conclusion that, as a matter of law, none of the three statutory standards had been

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[1] The remaining three refiners that received small allotments under the Secretary's order did not become parties to the action.

properly interpreted and applied.[2] The court refrained from deciding whether section 207(b), which imposes the limitation upon the portion of the Puerto Rican sugar quota that may be filled with direct-consumption sugar, is authorized by the Constitution. Judge Edgerton dissented from this aspect of the court's opinion and expressed the view that the constitutional question should have been decided.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

(1) In holding, as a matter of law, that it is doubtful whether the statutory standard "past marketings" includes marketings for more than the last half dozen years, and that marketings during the six wartime years 1942-1947 may not be excluded from consideration regardless of the abnormal conditions that prevailed;

(2) In holding, as a matter of law, that an allottee's ability to market the portion of the quota allotted to him may not be measured by actual per-

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[2] The court's decision is based upon its interpretation of the statutory standards themselves, and not upon a review of the record to determine whether the Secretary's judgment on the facts was arbitrarily or capriciously exercised. The court characterized the order as "very favorable" to one of the intervenors (R. 196), but the characterization is unjustified because the court did not purport to review the evidence to determine whether the Secretary made a fair and equitable distribution of the quota. Without such review it is impossible to determine whether the order is favorable or unfavorable to anyone.

formance more remote than performance during the preceding year;

(3) In holding, as a matter of law, that the statutory standard "processings of sugar from sugarcane to which proportionate shares pertained" must be given some weight, notwithstanding the conclusion of the Secretary that the standard is inapplicable to the facts involved, and that in the interest of fairness and equity (which is the controlling statutory guide) the standard should be given a zero weighting; and

(4) In reversing the order of the Secretary.

SUMMARY OF ARGUMENT

I.

A. The Act does not require the Secretary to restrict his consideration of past marketings to marketings during the preceding six years, and it does not require him to give any weight to marketings during a period when abnormal conditions prevailed. The statutory direction to consider past marketings is related to no particular period of time, and there is nothing in the Act that warrants reading into it a six-year limitation. When Congress has intended that marketings or production for a fixed period of time be considered, it has said so; and the failure to include a limitation in the Sugar Act indicates that no limitation was intended. Furthermore, the Act does not require the Secretary, when considering past marketings, to

give weight to the most recent marketings, though they are subject to abnormal conditions, merely because they are the most recent. The purpose of the Secretary's consideration is to reach a fair and equitable result. When the most recent marketings occur during an abnormal period and in the judgment of the Secretary would not provide the basis for an equitable allotment, he may properly consider those marketings as entitled to no weight and base his allotment upon marketings during a more normal period. The discretionary authority to choose the period of past marketings to be used as a basis for allotment necessarily includes the authority to exclude, after due consideration, abnormal periods. The quotas subject to allotment were themselves fixed by Congress with reference to marketings during a prewar period. Marketings during the period 1942-47 were sufficiently abnormal, due to various wartime dislocations, to warrant the Secretary in giving them no weight because of their unrepresentative nature. His use of prewar marketing figures as a basis for making the allotment involved a matter of judgment, and his judgment was not arbitrary or capricious.

B. The Act does not preclude the Secretary from measuring an allottee's ability to market the portion of the quota allotted to him by the allottee's actual performance during one of several preceding years, provided such performance is within the

limits of the present plant capacity of the allottee. The ability standard is a difficult one to apply because there is no easy way to measure ability, and each of the possible measures is subject to some objection. Actual performance in the past is demonstrated ability, and under many circumstances it is a more adequate indication of present ability than any other measure that is available to the Secretary.

While performance during a recent year would ordinarily be used for this purpose, the most recent year is not as a matter of statutory construction the only year that may be considered. The statutory standard is ability to market. The reasonableness of the performance period chosen to measure ability depends upon the circumstances and requires the exercise of an informed judgment by the Secretary. Frequently, performance during any one year is not an adequate measure of ability for all allottees. In order to take into account fluctuations due to unusual circumstances, performance during a longer period must be considered. The Secretary measured the ability of each allottee by the highest performance of the allottee during any one of the preceding 13 years, provided such performance was within the limits of its present plant capacity. His action was not arbitrary or capricious. Wartime controls unrelated to the Sugar Act or to present marketing conditions made performance during the preceding few years

an impractical mandatory measure of ability for all refiners. The measure used by the Secretary has the merit of recognizing the best demonstrated ability of each refiner during the entire period restrictive sugar legislation has been in effect, and does not penalize any refiner for interruptions caused by unusual circumstances such as strikes, fires, etc., and particularly the war. At the same time, it recognizes ability demonstrated by any refiner despite such difficulties.

C. The Act does not require the Secretary to give some weight to processings of sugar from sugarcane to which proportionate shares pertained when the Secretary considers the standard and determines that it is inapplicable under the particular circumstances involved. The statutory requirement is that the Secretary consider the standard. He is not required to give any maximum or minimum weight to it, and if the facts warrant giving no weight to the standard the Act does not preclude such action. As a matter of fact, the Act contemplates allotments under some circumstances—as, for instance, in the case of sugar produced in Cuba—where it would be impossible to give any weight to the standard. The Secretary gave no weight to it in the present case because only three allottees, who market less than 10 percent of the direct-consumption sugar, processed any sugar from proportionate-share sugarcane. The Secretary concluded that an allotment based upon a standard of such

limited applicability would not result in a fair and equitable distribution. That judgment was not arbitrary or capricious, and it did not affect adversely the respondents in this action. The respondents processed no sugar from proportionate-share sugarcane and would have received no benefit from the assignment of some weight to the standard.

The Secretary did not base his allotment upon a restoration of prewar competitive relationships. Any consideration of past marketings necessarily reflects the competitive relationships that existed during the period considered, but a prewar period was not selected as a measure of past marketings for that reason. The selection was amply justified because of the economic dislocations caused by the war. Moreover, inasmuch as ability to market was measured by each refiner's highest marketings during a period of years, and the highest marketings for all refiners did not occur in the same year, the ability factor does not reflect competitive relationships at any one time.

II.

The statutory limitation on the portion of the general sugar quota for Puerto Rico that may be filled with direct-consumption sugar does not violate the due process clause of the Fifth Amendment.

Section 207 of the Act limits the portion of the general sugar quota for Puerto Rico and for each

of the other offshore areas that may be marketed in the continental United States in the form of direct-consumption sugar. The purpose and the effect of the limitation are to distribute among the mainland refiners and the offshore refiners the opportunity to refine the limited amount of sugar permitted to be marketed under the general quotas. The refiners in the offshore areas may refine and market the portion of the offshore quotas specified in the Act, and the mainland refiners may refine and market the balance of the cane sugar permitted to be marketed under the quota program. The limitation is a part of an integrated system governing the marketing of all sugar. The system is designed to maintain the domestic sugar industry, including the mainland and offshore refiners, while at the same time protecting the interests of consumers.

The statutory limitation is within the plenary power of Congress to legislate for the territories and to regulate commerce between a territory and a state. Puerto Rico is an unincorporated territory of the United States over which Congress has full sovereign power. In the exercise of that power, Congress may limit or prohibit the amount or kind of goods that may be imported into the states from a territory. The exercise of the power to restrict imports from a territory by means of tax legislation has been sustained. The power to restrict imports directly by means of regulatory legislation is equally clear. It is immaterial that

the purpose or the effect of the legislation is to benefit or to grant a preference to the inhabitants of one or the other area. Congress may balance the interests of the two groups and legislate according to its concept of the welfare of the entire people. The statutory limitation in the Sugar Act is closely analogous to a protective tariff for the benefit of the mainland refiners, and the validity of such protective legislation is settled.

The statutory restriction is not discriminatory in the Constitutional sense. Puerto Rico is allowed to market direct-consumption sugar in an amount equal to the largest quantity marketed before the legislation was enacted. Such sugar is available for refining by Puerto Rican refiners. The balance of the quota must be marketed in raw form and thereby made available for refining on the mainland. That is a pattern of marketing that prevailed before sugar legislation was first enacted, and the Sugar Act merely continues it. The challenge to its validity is in reality directed to the wisdom of the policy rather than to the power of Congress to enact the legislation.

ARGUMENT

I. THE COURT OF APPEALS HAS MISCONSTRUED THE STATUTORY STANDARDS GOVERNING THE ALLOTMENTS OF QUOTAS. THE STANDARDS WERE PROPERLY INTERPRETED AND APPLIED BY THE SECRETARY.

The allotment by the Secretary of a marketing quota involves the performance of a function that is discretionary in nature. Congress itself has

fixed the general sugar quotas for each producing area and has specified the portion of each general quota that may be filled with direct-consumption sugar. However, the allotment of a quota among the persons who market or import sugar from an area must be made by the Secretary in accordance with delegated legislative authority that requires the exercise of broad discretion.

The controlling statutory guide is that an allotment shall be made "in such manner and in such amounts as to provide a fair, efficient, and equitable distribution" of the quota. The Act directs the Secretary to reach that result "by taking into consideration" three specific standards: (1) past marketings; (2) ability to market; and (3) processings of sugar from sugarcane to which proportionate shares pertained. However, the Act prescribes neither the weight to be attached to each standard nor the particular period of time to which the standard should be related. These factors must be determined by the Secretary in the exercise of his informed judgment in a manner that will result in a fair, efficient, and equitable distribution of the quota, which is the controlling statutory guide.

The fairness and equitableness of a distribution of a quota does not involve merely the application of a mathematical formula. There is no one plan of distribution that can be said to be the only fair one to the exclusion of all others. Alternative plans have different merits, and the selection of one of

several alternatives by the Secretary requires the exercise of judgment. Inasmuch as that judgment is essentially administrative in nature, the courts will not substitute their judgment for his judgment. The Secretary's judgment should be sustained unless no reasonable person could believe that it comported with the statutory test.

A. THE ACT DOES NOT REQUIRE THE SECRETARY TO RESTRICT HIS CONSIDERATION OF "PAST MARKETINGS" TO MARKETINGS DURING THE PRECEDING SIX YEARS, AND IT DOES NOT REQUIRE HIM TO GIVE WEIGHT TO MARKETINGS DURING A PERIOD WHEN ABNORMAL CONDITIONS PREVAILED. THE SECRETARY'S CONSIDERATION OF PAST MARKETINGS WHEN MAKING THE ALLOTMENT UNDER REVIEW WAS NOT ARBITRARY OR CAPRICIOUS.

The Act directs the Secretary to make allotments that are fair, efficient, and equitable by taking into consideration, among other things, the past marketings of prospective allottees. The direction is related to no particular period of time.

The Secretary recognized in his order that under normal circumstances marketings during the most recent period should be considered, but he concluded that he could not give weight to such marketings in the present case because the abnormal marketing conditions that prevailed during the preceding war years, 1942-47, made them an inappropriate base for a fair and equitable allotment. He therefore determined that the allotment should be based upon marketings during a prewar period,

which was the only alternative available. He chose the period 1935-41. However, in recognition of the fact that some of the refiners did not operate during all those years, he measured the past marketings of each refiner by the average of its highest marketings for any five of the seven years (R. 170).

The court below held that in excluding (i.e., in giving no weight to) marketings during the war years the Secretary failed to comply with the Act; that the prewar marketings considered by him were no measure of past marketings; and that it is doubtful whether the Act permits a consideration of marketings for more than the preceding half-dozen years. Upon the basis of that interpretation of the Act and without considering the facts in the record bearing upon the reasonableness of the Secretary's action, the court below concluded that the Secretary's order was invalid.

The Act is not properly subject to that interpretation. The Court of Appeals improperly read into the Act a six-year limitation on the period of past marketings that may be considered by the Secretary. No fixed period is prescribed in the Act, and the absence of a statutory limitation leaves the period for determination by the Secretary. In other quota legislation, when Congress has intended that marketings for a fixed period be considered it has clearly said so.[3] The failure to

[3] In the Agricultural Adjustment Act of 1938, 52 Stat. 31, 7 U. S. C. 1281, Congress provided that the national marketing quota for tobacco shall be apportioned among the states

say so in this Act indicates an intention to impose no fixed limitation.

The report of the House Committee on Agriculture[4] with respect to the language of section 302(b) of the Act is a persuasive indication of that intention. Section 302(b) relates to the establishment of individual farm allotments, called proportionate shares (that is, each farm's proportionate share of the sugarcane required to produce the quantity of sugar needed to fill the quota). Farm allotments are based in part upon the past production of each farm. The similarity of the problem of establishing allotments for farms upon the basis of past production and the problem of establishing allotments for processors upon the basis of past marketings makes the language of the Committee significant. The Committee said:

> In view of the differences in conditions of production obtaining in the various sugar-producing areas, the committee has not attempted to specify the exact manner in which the Secretary shall use production history. It is the

on the basis of the total production of tobacco in each state during the five years immediately preceding the year in which the quota is proclaimed (section 313(a), 7 U. S. C. 1313(a)). Similar provision was made for the apportionment of marketing quotas at the state or county level for corn, wheat, cotton, rice, and peanuts (section 329(a), 7 U. S. C. 1329(a); section 334(a), (b), 7 U. S. C. 1334 (a)(b); section 344 (a)(c), 7 U. S. C. 1344 (a)(c); section 353(a), 7 U. S. C. 1353(a); section 358(c), 7 U. S. C. 1358(c)). In contrast, the act requires some allotments at the farm level to be based in part on past marketings, but the period to be considered is not specified (section 313(b), 7 U. S. C. 1313(b); section 353(b), 7 U. S. C. 1353(b); section 358(d), 7 U. S. C. 1358(d)).

[4] H. Rep. No. 796, 80th Cong., 1st Sess., p. 8.

> judgment of the committee that considerable discretion should be left to the Secretary to deal with the varied and changing conditions in the various producing areas, in order to establish fair and equitable proportionate shares for farms in such areas.

It is also significant that none of the parties to this action has contended that the Secretary is limited by the Act to a consideration of marketings during the preceding six-year period. At the administrative hearing that preceded the issuance of the Secretary's order, the respondents urged the Secretary to consider past marketings during the preceding ten-year period (R. 45, 120).

It is worth noting that when enacting the Sugar Act of 1948 Congress fixed the general quotas for the domestic sugar-producing areas at figures that bore no close relationship to marketings during the preceding few years, which were war years, but that bore a close relationship to marketings during the more remote period 1937-41. The figures are tabulated below.[5] In only one area did marketings during any war year exceed the quota adopted by Congress, but in three of the areas marketings dur- a prewar year exceeded the quotas adopted.[6] Fur-

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	Domestic Beet Area	Mainland Cane Area	Hawaii	Puerto Rico
	Short tons, Raw value			
[5] 1942-46 average marketings	1,300,500	448,500	758,500	846,000
1937-41 average marketings	1,901,000	469,000	940,000	929,000
1948 Sugar Act quota	1,800,000	500,000	1,052,000	910,000
[6] Highest year of marketings, 1942-46	1,702,500	514,500	865,500	902,000
Highest year of marketings, 1937-41	1,952,000	586,500	985,000	1,126,000

(The data in this and the preceding footnote are from reports obtained by the Department of Agriculture in the administration of Public Resolution 109, 74th Congress, and the Sugar Act of 1937.)

thermore, the 126,033 ton limitation on the direct-consumption portion of the sugar quota for Puerto Rico that is involved in this action is derived directly from the marketings of such sugar in 1933. In the Jones-Costigan Act of 1934, 48 Stat. 670, 7 U. S. C. 608a, 609, 611, the limitation was stated in terms of the largest quantity of direct-consumption sugar shipped from Puerto Rico to the United States during the preceding three years, 1931-33. That quantity was computed at 126,033 short tons, raw value,[7] and the figure was incorporated in both the Sugar Act of 1937 and the Sugar Act of 1948. Congress could hardly have intended to require the Secretary to restrict his consideration of past marketings to the preceding six years in the allotment of quotas when the quotas themselves are related to marketings during an earlier period.

In addition to a six-year limitation on the period of past marketings that may be considered by the Secretary, the court below also improperly read into the Act a prohibition against the Secretary excluding recent periods when abnormal conditions prevail. No such requirement is contained in the Act, and the court's conclusion is inconsistent with the specific statutory direction that the Secretary consider past marketings in a manner that will result in a fair and equitable distribution.

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[7] General Sugar Quota Regulations, Series 1, p. 4, June 9, 1934; General Sugar Quota Regulations, Series 2, Revision 1, p. 4, August 17, 1935.

Significantly, in other legislation involving the allotment of quotas for agricultural products, the Secretary is required when considering past marketings and past production to make due allowances for abnormal weather conditions.[8] The general and unrestricted language of the Sugar Act should not be construed to preclude the Secretary when allotting sugar quotas from making similar allowances, whether the abnormal conditions are due to weather or to war.

War is only one of the abnormal conditions that may make it impractical to give any substantial weight to marketings during a particular period. Abnormal weather conditions might equally well cause the Secretary to discount or to disregard marketings during a particular period in order to make a fair and equitable distribution of a quota. Weather is an important factor in the production and marketing of sugar, and when unusual weather hazards affect different allottees in greatly differing degrees a proper allowance for that fact may be necessary in order to allot a quota fairly.

In Puerto Rico the years 1942-47 were abnormal ones from the standpoint of weather, and although the Secretary found it unnecessary to explore that factor because of his conclusion regarding wartime dislocations, the facts with respect to weather illustrate the necessity for a construction of the statute

[8] Agricultural Adjustment Act of 1938, 52 Stat. 31, 7 U. S. C. 1281, sections 313, 329, 334, 344, 353, 358.

that will permit the Secretary to make proper allowances for abnormal marketing periods.

A severe drought in 1943-44[9] decreased the production of sugar in the islands by more than 30 percent from the previous year. The drought was of varying degrees of severity and some of the mills were affected more severely than others. The decrease in production by mills ranged from 8 percent to 57 percent. The change in the relative positions of the mills caused by this abnormal condition is emphasized by the fact that the production that year for about half the mills was either the highest or the lowest percentage of any crop produced during the eleven-year period 1938-49. The figures are tabulated in Appendices A, B, and C.

Rainfall was also below normal in the years 1946 and 1947, but the effects of the subnormal rainfall were not uniform throughout the island. In the north, east, and west parts of the island rainfall normally is high and sometimes is excessive. In contrast, the south part of the island is an area of comparatively light rainfall; its long time average rainfall is little more than half that of the other three parts of the island. The comparative figures are tabulated in Appendix D. During the war, shortages of fertilizers and other supplies required for production affected both total production in the

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[9] Climatological Data—West Indies and Caribbean Service, published by the United States Department of Commerce, Weather Bureau, Vol. XXIII, Nos. 9-12, September-December 1943; Vol. XXIV, Nos. 1-5, January-May 1944.

island and relative production in the various areas. At the close of the war when supplies of fertilizers became more adequate, the drought conditions prevented production in the southern area from responding to the extent that it did in the other areas. Accordingly, relative production in the south part of the island fell progressively, reaching the lowest point in 1947. The data are tabulated in Appendix E.

The Court of Appeals' restrictive interpretation of the "past marketings" standard is particularly unfortunate when applied to this period. By precluding the Secretary from making proper allowances for marketings during this abnormal period, the lower court would require the selection of the lowest average marketings for the south part of the island that it has had in recent times. Moreover, by requiring the use of 1947 marketings as a measure of ability to market in 1948 (which is the subject discussed in the next point in this brief), the lower court would require the selection of the year in which the south part of the island produced the lowest percentage of the total Puerto Rican crop it produced in the entire period since 1930.

As the lower court's decision, if not corrected, will govern the allotments of quotas in other areas,[10] the serious consequences that could result from its restrictive interpretation should be noted.

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[10] Section 202 of the Act. The other areas are the domestic beet sugar area, the mainland cane sugar area, Hawaii, Virgin Islands, Republic of the Philippines, and Cuba.

In the mainland cane area, a severe freeze at the beginning of the 1934 harvesting season[11] resulted in a 31.7 percent decrease in sugar production in Florida but did not affect production in Louisiana. The converse situation prevailed in 1940, when a prolonged freeze[12] resulted in a 45.9 percent decrease in sugar production in Louisiana but did not affect production in Florida. The figures are tabulated in Appendix H. The mandatory use of a period of past marketings that arbitrarily included either of those years would have resulted in serious inequities among the allottees in the area. In order to make a fair and equitable allotment, the Secretary must have the authority to make proper allowances for such abnormal conditions.

The droughts and dust storms that occurred throughout a large part of the western continental United States during 1934 and 1936 affected crop production to such an extent that a national problem was presented. Congress was well acquainted with those facts when it enacted the Sugar Act of 1937 and the Sugar Act of 1948. It is most improbable that Congress intended to require the Secretary when making allotments in 1937 to use the 1934 and 1936 drought years in measuring past marketings, or to use any years when similar con-

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[11] Climatological Data—Florida Section, published by the United States Department of Commerce, Weather Bureau, Vol. XXXVIII, December 1934.

[12] Climatological Data—Louisiana Section, published by the United States Department of Commerce, Weather Bureau, Vol. XLV, No. 13, 1940.

ditions prevail. It is even more improbable that Congress would have required the Secretary to use production or marketings in a single one of such years, or in a similar year in the future, as a measure of ability to market. Yet, that is the result compelled by the rule of construction adopted by the lower court.

Many instances could be adduced in which a year or particular period of years furnishes no adequate index to either past or probable future production or marketings.[13]

Unusual weather conditions are only one of the abnormal situations that must be appraised by the Secretary when considering "past marketings" of prospective allottees. Plant diseases are another.[14]

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[13] For example, the State of Michigan produced an average of 128,000 short tons of sugar for the years 1920 to 1925, inclusive. Then production declined to as low as 57,000 tons in 1929 and did not fully recover until 1932. From 1932 to 1942, production exceeded the earlier level, averaging 147,000 tons although in 1937 it dropped to 79,000 tons. See Appendix F.

Similarly, the State of Louisiana experienced production difficulties during the 1920's. For the years 1909 to 1922 the State of Louisiana had an average production of 261,000 short tons of sugar. Production then decreased drastically, to as low as 48,000 tons in 1926. From 1929 through 1948 production and marketings of sugar for the State of Louisiana averaged 322,000 tons, but ranged from 160,000 in 1931 to 491,000 in 1938, and dropped from the latter figure down to 235,000 in 1940. See Appendix G.

[14] Hearing before a Subcommittee of the Committee on Agriculture, House of Representatives, 79th Cong., 1st Sess., on Investigation of Diseases Affecting Sugar Production, October 29 and 31, 1945, Serial F, p. 18, "Research on Sugar Plants and Some Practical Adaptations," excerpts from an address by E. W. Brandes, Head Pathologist in Charge, Division of Sugar Plant Investigations, Bureau of Plant Industry,

War, like weather and disease, is still another abnormal condition beyond the control of individual farmers, and its effects upon production and marketing may be the most serious of the three. The Philippines are a dramatic example. The production of sugar declined from 1,148,000 tons in 1940 to 75,000 tons in 1944, and in 1947 production was still less than half the prewar figure.[15] Moreover, during the period of Japanese occupation of the islands there were no shipments of sugar to the continental United States, and since the liberation of the islands the shipments of sugar have been far below normal. If the Philippine quota were allotted in accordance with the provisions of the Act,

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Soils, and Agricultural Engineering, Agricultural Research Administration, United States Department of Agriculture, before the second general meeting of the American Society of Sugar Beet Technologists, Denver, Colorado, on January 5, 1940:

"In comparison with many other sugar-producing areas, the United States has made much progress in the improvement of the sugar plants during the past 20 years. In that period there has been a series of interruptions in growth of the several sugar industries, in the main resulting from natural causes adversely affecting the plants themselves.

"These natural causes, chiefly plant diseases, more than any other factors have threatened the continued existence of the industries. Their impact on the industries and their effects on growth have varied in duration and degree and have been different in character. The interruptions in productivity of our sugar industries during the past 20 years were characterized, for example, by practical collapse in Louisiana and the South, violent and unpredictable annual fluctuations of output in the western beet areas, and curtailment in Puerto Rico lesser in proportion but equivalent in amount to that in Louisiana."

[15] The World Sugar Situation, September 1948, p. 38, published by the Bureau of Agricultural Economics, United States Department of Agriculture.

the "past marketings" standard would of necessity have to be applied to a prewar period.

When considering past marketings, the authority of the Secretary to take into account the abnormalities created by war is not different in principle from his authority to take into account the abnormalities created by natural hazards. The prewar marketings considered by the Secretary were past marketings. Their use and the exclusion of the war years as a basis for the allotment was not a failure "to comply with the Act," as the court below said it was. The decision was an exercise of the discretion granted by Congress to choose the years to be considered. The only question is whether the Secretary had a rational basis for his action.

The Secretary's reasons for giving no weight to marketings during the immediately preceding war years were impelling ones. The period was one of great abnormality. The wartime dislocations materially interfered with each refiner's control over its own marketings, and the marketings during that period consequently did not reflect the normal operation of the companies. The disruptive factors, as set forth in the Secretary's order and in the record, may be summarized as follows:

1. For the years 1944-1947, the Commodity Credit Corporation, an agency within the Department of Agriculture, purchased from the raw sugar mills in Puerto Rico the entire available supply of raw sugar, except the amount needed to supply local needs. Com-

modity Credit Corporation then determined the percentage of the total supply of raw sugar that could be refined in Puerto Rico for consumption in the continental United States. The determination was governed by wartime considerations and not by Title II of the Sugar Act of 1937, which was suspended. (R. 109.)[16] In 1944, 1945, and 1946, this percentage of the production of each raw sugar mill was released by Commodity Credit Corporation to the mill, and each mill was free to sell the released raw sugar to any refiner. The refiners, who customarily purchased and refined the entire output of a few mills, were thereby prevented from buying all their raw sugar from their usual sources of supply, and they had to compete for sugar from many different mills. The operation of the normal competitive system was thus materially affected. (R. 32-34, 67.)

2. In 1947, Commodity Credit Corporation specifically limited through its control of the raw sugar supply the amount of refined sugar each Puerto Rican refiner could send to the continental United States. Instead of releasing a portion of the raw sugar supply to each mill, as it had done in the preceding three years, a quota was assigned to each refiner and the refiner was asked to designate the mill from which it wished to purchase its raw sugar. The necessary quantity of raw sugar

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[16] The Sugar Act of 1937 expired December 31, 1947, and the sugar control program, with amendments, was reenacted in the Sugar Act of 1948.

was then released to that mill. The total quantity of refined sugar and the quota allowed each refiner were governed by wartime considerations without regard to the provisions of the Sugar Act of 1937. (R. 12-14, 68-69.)

3. A national emergency existed with respect to sugar from April 1942 to November 1947, and during that time the provisions of Title II of the Sugar Act of 1937 were suspended by the President (R. 109).

4. Wartime controls of both imports and exports of sugar existed until October 1947 (R. 109).

5. Sugar was subject to price control from August 1941 to October 1947, and to rationing control from April 1942 until June 1947 (R. 109-110).

6. All shipping in the Caribbean was convoyed because of the menace of enemy submarines, and shipping space was drastically limited (R. 70-72). Even the limited shipping space was not always available at the time needed. When this situation occurred, a chain reaction resulted that affected the ability of refiners to produce and market their sugar. (R. 40-41, 77, 79-80.) The refiners had limited storage facilities (R. 63-64, 66-67). When their warehouses were full and ships were not available, they had to curtail production. This soon required the raw sugar mills supplying the refiners to curtail the production of raw sugar because they too had limited storage facilities. (R. 39, 76, 104.) The problem of

> limited storage space was further intensified by transportation difficulties between the raw sugar mills and the refineries, and between the refineries and the ports. These transportation difficulties were caused or increased by black-out regulations, by gasoline and tire rationing, and by a shortage of bags and other essential materials. (R. 63-64.)

The refiners were not equally affected by these wartime dislocations (R. 23-24, 170, and record references there cited). Some of them were more fortunately located with respect to raw sugar supplies and with respect to port facilities than were others. Some of them were more fortunate than others in obtaining the raw sugar released by Commodity Credit Corporation for refining and shipment to the continental United States. The period was not a normal one,[17] and the competitive relationships between the refiners were not normal ones.

The degree of abnormality is a matter of judgment. The Secretary concluded that the wartime disruptions were so great that allotments based upon marketings during the period 1942-47 would not result in a fair, efficient, and equitable distribution of the quota. While others may differ with

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[17] Although the Sugar Act of 1937 provided for the shipment of 126,033 short tons, raw value, of direct-consumption sugar from Puerto Rico to the continental United States, the quantity shipped during each of the years 1942-47, respectively, was 96,074, 107,589, 78,166, 108,900, 121,543, and 130,063 (R. 147).

that judgment, the portions of the record summarized above amply indicate that the Secretary's judgment was not an arbitrary or capricious one.

After rejecting the period 1942-47, the Secretary concluded that the prewar years 1935-41 would be a representative period for the purpose of considering past marketings. However, as the respondent Roig did not ship direct-consumption sugar to the continental United States during one of those years, and as another refiner (not a party to this action) made no shipments during two of those years (R. 147), the past marketings of each refiner were measured by averaging its marketings for the highest five years of the seven-year period.

The Secretary had a sound, rational basis for choosing the years 1935-41. That represented the entire period preceding the year of allotment during which quotas were in effect. In choosing them, the Secretary conformed to prior administrative practice under the Act,[18] and such practice is entitled to great weight. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315; *United States* v. *American Trucking Assn's*, 310 U. S. 534, 549; *Gray* v. *Powell*, 314 U. S. 402,

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[18] In the orders allotting the direct-consumption portion of the Puerto Rican quota for 1938 and 1939, the past marketings selected for consideration represented the "years during which a quota system was in effect" (P. R. S. O. No. 11, 3 F. R. 1077), and "the entire period during which a quota system has been in effect and, consequently, are believed to be fair and reasonable under a restrictive program such as that provided for under the present and prior sugar legislation." (P. R. S. O. No. 13, 4 F. R. 97).

412; *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178, 182.

The respondents relied in the court below upon a comment of Judge (now Chief Justice) Vinson in *Gay Union Corp.* v. *Wallace*, 112 F. 2d 192, 199 (C. A. D. C.), certiorari denied, 310 U. S. 647, to the effect that the selection of a remote period of past marketings "might" effect an arbitrary discrimination if it bore no reasonable relationship to the present marketing situation. The comment, while obviously true, is not applicable to the present case. The selection of a prewar period was made necessary by the wartime dislocations that prevailed during the preceding six years. The reasons for not considering marketings during those years were impelling ones, and the selection of a prewar period was the only alternative available. Marketings during the prewar period were, in fact, the only marketings that bore a reasonable relationship to the present situation.

B. THE ACT DOES NOT PRECLUDE THE SECRETARY FROM MEASURING AN ALLOTTEE'S "ABILITY TO MARKET" THE PORTION OF THE QUOTA ALLOTTED TO HIM BY ACTUAL PERFORMANCE PRIOR TO THE PRECEDING YEAR. THE SECRETARY'S CONSIDERATION OF "ABILITY TO MARKET" WHEN MAKING THE ALLOTMENT UNDER REVIEW WAS NOT ARBITRARY OR CAPRICIOUS.

When making an allotment the Secretary is also required by the Act to take into consideration "the ability of * * * [an allottee] to market or import that portion of such quota * * * allotted to him."

If this standard were being considered for the first time, it might well be regarded merely as a check to be applied after an allotment had been otherwise determined, rather than as one of the affirmative measures of the allotment. That is, the Secretary might first tentatively allot the quota on the basis of the other standards specified in the Act and then consider whether the allottee is able to market the portion of the quota allotted to him. But that is not the construction that has been given the Act, and it is not the construction urged in this proceeding. When allotting the direct-consumption portion of the quota for Puerto Rico under the Sugar Act of 1937, the Secretary consistently considered ability to market as one of the measures of the allotment. In *Gay Union Corp.* v. *Wallace* 112 F. 2d 192, 197, fn. 12, certiorari denied, 310 U. S. 647, the court noted with approval the Secretary's practice. And when Congress enacted the Sugar Act of 1948 upon the expiration of the Sugar Act of 1937, no disapproval of the administrative interpretation and application of the standard was indicated. Furthermore, in the administrative proceedings before the Secretary in this case, the respondents concurred in the proposal to give 50 percent weight to this factor when determining the allotments. Their objection related only to the proposed method of measuring ability to market (R. 47, 120).

Ability to market is difficult to measure. There is no single adequate measure. The Secretary concluded that each allottee's present ability to market could best be measured by its actual performance in the past rather than by its plant capacity alone; that under ordinary circumstances performance during a recent year would be used for the purpose, but the abnormal marketing conditions during the preceding war years made their use as the sole measure of ability unfair and inaccurate; and that it would be fair to use as a measure the highest performance of each allottee during any war or prewar year since 1935, provided such performance was within the limits of its present plant capacity. Thus, the Secretary recognized past performance as an indication of present ability if present physical plant facilities permitted the production of the same or a greater quantity of sugar.

The court below held that actual performance in the past is a permissible measure of present ability to market,[19] but that as a matter of law the only performance that may be considered is performance during the preceding year regardless of any abnormal situation that may have prevailed then. The court said that performance during 12 of the 13 years permitted to be considered by the order

[19] See statements of the same court to the same effect in *Gay Union Corp. v. Wallace*, 112 F. 2d 192, 197, 199, certiorari denied, 310 U. S. 647, a case arising under the Sugar Act of 1937.

under review had nothing to do with ability to market in 1948, and that under the terms of the Act the only performance that may be used as a measure of ability is current performance, meaning performance during the preceding year. Upon the basis of that interpretation of the Act and without considering the reasonableness of the Secretary's action in the light of the facts involved, the court concluded that the Secretary's order was invalid.

The court's interpretation of the Act is clearly erroneous. The statutory standard is "ability to market." The issue presented is the reasonableness of the method used by the Secretary to measure ability to market. Both the Secretary and the respondents are in agreement that past performance is a permissible measure of *present* ability, and the court below accepted that interpretation of the Act. Consequently, the issue is narrowed to one of the reasonableness of the period of past performance selected as a measure. The reasonableness of the period selected depends upon the particular facts involved and not upon a construction of the statute as a matter of law. There is therefore no basis for the court's conclusion that as a matter of statutory construction the only performance that may be considered, as a measure of ability, is performance during the preceding year. Such performance is past performance, despite the court's reference to it as current performance, and

the selection of one period of past performance rather than another involves a matter of judgment for determination by the Secretary and not a question of law. The Secretary's judgment should not be set aside unless it is shown to be clearly arbitrary or capricious.

Performance one, ten, or thirteen years ago is a specific demonstration of ability to market. The figures are not theoretical. They are a record of actual marketings. Moreover, such demonstrated ability may continue to exist over a period of years even though not fully utilized. The court ignored this fact and erroneously assumed that ability demonstrated in a period more remote than the preceding year would never continue to the current year. The erroneous nature of the assumption is illustrated by the marketing record of the respondents. Roig marketed on the mainland 28,657 tons of sugar in 1940. During the next five years (1941-45), however, its maximum annual marketings were only 16,863 tons. Then in 1946 it marketed 24,414 tons. Similarly, Western attained a level no higher than 17,765 tons in any one of the four years 1941 through 1944, but it marketed 25,598 tons in 1940 and 24,655 tons in 1945 (R. 147). Thus, Roig obviously did not lack in 1946 the ability demonstrated in 1940, notwithstanding its failure to utilize its ability fully in the preceding year; and Western clearly had in 1945 an ability greater than that demonstrated in 1944.

Ability to market is affected by a large number of factors that vary from year to year. Peak performance in one year may be followed by decreased marketings in the following year or period of years, and then by a return to the level of marketing that approximates performance in the peak year. If the physical plant facilities of the refiner remain unimpaired, and if there are no facts to show affirmatively that the ability demonstrated in the peak year no longer exists, the logical assumption is that the ability continues to exist and may be demonstrated again in the current year.

A requirement that ability be determined by performance in a particular year or even a short period of years can result in serious inequities to allottees. Necessarily, performance figures during a fixed period indicate the relative positions of the various allottees. If during a particular year conditions are uniformly favorable or unfavorable to all allottees, the year could be a satisfactory basis for a determination of ability. However, if conditions during one year are particularly favorable to some allottees and particularly unfavorable to others, the use of that year would result in discrimination and unfair allotments. Even for a period of years conditions may continue to be abnormally favorable for some and abnormally unfavorable for other allottees. It is therefore important that the Secretary have sufficient latitude to measure ability by the best performance of each

allottee over a period of years, and thus give uniform treatment to all allottees. The Court of Appeals' requirement that ability be measured only by performance during the year immediately preceding the year of allotment would tend to perpetuate the results of accidental misfortunes of production or marketing occurring in that year.

Furthermore, in view of the fact that the performance figures for each refiner go up and down from year to year, the mandatory use for all allottees of performance figures only for the preceding year would never be a realistic measure of ability when the marketing trend is upward. For example, with respect to an individual refiner, the facts in this case show that the performance figure for Porto Rican American in 1947, 60,820 tons (R. 147), was no realistic indication of its ability to market in 1948 because Porto Rican American actually marketed 82,070 tons in that year. With respect to the industry as a whole, performance figures during the severe drought year 1944 were no realistic indication of ability to market in 1945 because there was a general and substantial increase in production and marketing following the drought. See Appendix B. These illustrations indicate the importance of an interpretation of the statutory standard that will not make it rigid and inflexible. The statute should not be construed to require the Secretary to measure ability to market by performance during any one year. He should

be free, when circumstances warrant, to take into consideration abnormal fluctuations in marketings from year to year and to determine ability on the basis of the best performance figures during a period of years.

The court's restrictive interpretation of the standard to preclude measuring ability by performance during any period other than the preceding year will seriously hamper not only the allotment of the direct-consumption portion of the quota for Puerto Rico, but also the allotment of the general quotas prescribed by section 202 for all the domestic sugar-producing areas.

The Secretary's measure of ability to market by past performance was not arbitrary or capricious. Performance during the preceding year 1947 did not fairly reflect the current ability of all refiners because their marketings were controlled by the Commodity Credit Corporation on the basis of wartime considerations that were unrelated to the provisions of the Sugar Act or to normal marketing conditions.[20] One of the refiners (the petitioner Porto Rican American Sugar Refinery, Inc.)

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[20] Respondent Western Sugar Refining Company was allowed to market 29,965 tons, which was more than it had marketed during any preceding year; Respondent Central Roig Refining Company was allowed to market 27,246 tons, which was more than it had marketed during any preceding year except one (1940, when quotas were not in effect); Petitioner Porto Rican American Sugar Refinery, Inc., was allowed to market 60,820 tons, which was considerably less than it had marketed during any of the seven years 1935-41 inclusive (R. 147).

sought permission to market a much larger quantity than originally permitted by Commodity Credit Corporation, and although it had the ability to market the larger quantity permission was denied (R. 68-69, 158). Consequently, it was reasonable for the Secretary to reject 1947 performance figures as a mandatory measure of ability to market for all refiners; the performance figures for that year obviously did not indicate the ability of some of the refiners.

Performance during the war years 1942-46 likewise did not fairly reflect the ability of all refiners because of the wartime dislocations discussed above. During each of those years the combined marketings of all refiners were less than the 126,033 tons authorized by the Act (R. 147), and the separate marketings of each refiner did not reflect fairly its relative ability because the abnormal marketing conditions did not affect all refiners equally. Moreover, performance figures during this period, subject as they were to wartime factors, were not realistic indications of ability to market in 1948 when those wartime disruptions had been removed. So it was entirely reasonable for the Secretary to reject 1942-46 performance figures as a mandatory measure of ability for all refiners.

It was therefore necessary to permit ability to be measured by performance during a prewar

period. The year 1935 was selected as the starting point because that was the first full year when sugar quota legislation was effective. However, there was little reason to choose one year rather than another during the prewar period 1935-41. In fact, no one year during that period could be used without doing an injustice to some refiner. Moreover, the Secretary did not wish to exclude performance figures during the war years for those refiners who were able to demonstrate an increased ability despite the wartime dislocations. He therefore took as a measure of ability the highest performance of each refiner during the entire 13-year period preceding the allotment (1935-47), subject to the qualification that it must be within the limits of its present plant capacity. In each instance, the plant capacity of the refiner was well above the marketings for the year selected to measure ability to market. (R. 17, 28, 149, 164.)

The use of present plant capacity as a check on ability so measured assures the continued existence of the physical plant that made such performance possible. Obviously, if a plant had been destroyed by fire or hurricane and had not been restored, performance figures for any prior year would not indicate present ability.

Plant capacity alone is not a satisfactory measure of ability because in Puerto Rico plant capacity is never fully utilized by any refiner for an entire year. The refiners operate only during the

season when raw sugar mills are grinding cane; the bagasse (the crushed cane stalk), which is a byproduct of the raw mills, is the principal source of fuel for the refiners, and when the grinding season is over the refiners cease operating. The length of the grinding season varies by localities and by years; it is not the same for all refiners in a single year or for a single refiner in different years. Furthermore, the maximum daily capacity demonstrated by production during the grinding season is never maintained throughout the season because of reduced supplies of raw sugar available at the beginning and at the end of the season. Consequently, plant capacity figures computed on an annual basis are theoretical ones based upon conditions that do not exist in practice.

The purpose of considering ability to market is to make a fair, efficient, and equitable distribution of the quota. The fairness of the distribution is a matter of judgment, and under the terms of the Act the judgment of the Secretary is controlling unless it is patently capricious. The factors that influenced the Secretary in his appraisal and measurement of ability to market are fully stated and carefully analyzed in his decision. Although the respondents, and perhaps this Court, might have reached a different conclusion on the basis of the same facts, the Secretary's judgment was a reasonable one and cannot be regarded as arbitrary or

capricious.[21] Even if it were a matter of choosing between two alternatives, it is respectfully suggested that the measure of ability used by the Secretary is more reasonable than the measure required to be used by the opinion of the court below (1947 performance figures), which clearly did not reflect the ability of some refiners.

C. THE ACT DOES NOT REQUIRE THE SECRETARY TO GIVE SOME WEIGHT TO "PROCESSINGS OF SUGAR * * * FROM * * * SUGARCANE TO WHICH PROPORTIONATE SHARES * * * PERTAINED" WHEN THE SECRETARY CONSIDERS THE STANDARD AND DETERMINES IT IS INAPPLICABLE UNDER THE CIRCUMSTANCES INVOLVED

Section 205(a) of the Act directs the Secretary, when making a fair, efficient, and equitable allotment, to take into consideration "processings of sugar * * * from * * * sugarcane to which proportionate shares * * * pertained." Such sugarcane is sugarcane produced within the limits of individual farm allotments; that is, it is each farm's proportionate share of sugarcane needed to be produced to fill the quota for the area (section 301(b) of the Act). Title III of the Act authorizes the Secretary to make conditional payments to producers who, among other things, do not market sugarcane in excess of their proportionate shares. The direction to the Secre-

[21] *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297; *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266.

tary to consider processings from proportionate-share sugarcane when allotting the quota for an area under Title II is a device to protect producers by assuring them that the raw mills to which they sell their cane will have allotments large enough to permit the marketing of all proportionate-share sugarcane.

The Secretary considered this standard and concluded that it was not applicable to the particular facts involved in making the allotment of the direct-consumption portion of the Puerto Rican quota, and that it should therefore be given a zero weighting. It was regarded as inapplicable because the refiners of more than 90 percent of the sugar used to fill the quota (including the two respondents) processed sugar, not from proportionate-share sugarcane, but from raw sugar. Any weight given to a factor that applied only to refiners of less than 10 percent of the sugar would not produce an equitable result.

The Court of Appeals held that these facts might warrant giving slight weight to the standard, but that as a matter of law the Secretary is required to give some weight to it.

It is submitted that this interpretation is also erroneous. The Act requires only that the Secretary make a fair, efficient, and equitable distribution of the quota "by taking into consideration" the three specific standards, and the Secretary explicitly gave consideration to this standard in the

instant case. The Act says only that he shall consider the three standards; it does not say how much weight, if any, he shall give to each of them. If the Secretary determines, after considering all the facts, that a fair and equitable allotment requires a zero weighting to be given to processings of sugar from proportionate-share sugarcane, there is nothing in the language of the Act that justifies a conclusion that he must nevertheless give a nominal weight to the standard. The Act makes no more distinction between a zero and a nominal weighting of one percent than it does between a 49 percent and 50 percent weighting. Moreover, the court's action in remanding the case to the Secretary for the assigment of a nominal weight to the standard is a meaningless gesture because the action would have no appreciable effect upon the final allotment figures.

A proportionate share is a farm's proportionate share of the sugarcane needed to be produced to fill the general quota for the area. The term relates only to the general quota; it bears no relation whatever to the direct-consumption portion of the quota.[22] The statutory requirement that processings of proportionate-share sugarcane be considered when allotting a quota has particular relevance to allotments of the general quotas because

[22] The general quota for an area is the total amount of sugar from the area that may be marketed in any form in the continental United States. The direct-consumption portion of quota is the portion that may be marketed in the form of direct-consumption sugar (which is usually refined sugar).

it is the allottees of those quotas (i.e., the raw sugar mills) that buy and process proportionate-share sugarcane. Such processings therefore have a direct bearing upon the amount of the general quotas that should go to each allottee; that is, each allottee should receive an allotment large enough to permit him to process all proportionate-share sugarcane brought to his raw mill by producers. In some areas, however, including Puerto Rico, the refiners of most of the sugar marketed in the United States in direct-consumption form do not themselves process proportionate-share sugarcane; they refine raw sugar purchased from the raw mills. Consequently, the statutory standard has little or no relevance to the allotment to the refiners of the direct-consumption portion of the quota in those areas. Whether the Secretary is warranted in giving no weight to the standard must depend upon the particular circumstances involved and not upon an abstract interpretation of the standard without reference to the facts.

The lower court's unqualified assertion that the Secretary must always give some weight to this standard is demonstrably erroneous. Thus, the Act provides for the allotment of quotas or parts thereof for different areas, both domestic and foreign. The same statutory standards, however, govern the making of all allotments. If a quota for a foreign area, e.g., Cuba, should be allotted to the importers of sugar from the area, as the Act

authorizes, it would be impossible to give this particular factor any affirmative weight. The Act does not, of course, provide for the assignment of proportionate shares to individual farms in Cuba. Consequently, no importer-allottee could be a processor of proportionate-share sugarcane grown in Cuba, and the standard would of necessity be given a zero weighting.

The court below, in support of its interpretation of the Act, relied upon the fact that in the Sugar Act of 1937 the three standards to be considered by the Secretary were joined by the disjunctive "or," but that when the Sugar Act of 1948 was enacted the disjunctive "or" was changed to the conjunctive "and." The legislative history of the Act throws no light on the reason for this change. The lack of an explanation is unimportant, however, because the language of the Act cannot reasonably be construed to require the Secretary, after considering the pertinent facts, to give some weight to all three factors under all circumstances. He must be free to vary the weight assigned to each according to the differing circumstances, and the weight assigned may reach the vanishing point. It is important to note, however, that the Government does not contend in this case that the Secretary has discretionary power to make allotments at will upon the basis of any one or any combination of the three standards set forth in the Act, ignoring the standard or standards not invoked. That issue is not

presented here. The Government contends merely that when the Secretary finds that under the particular facts before him one of the standards is not applicable, and his finding has a reasonable basis in fact, he may give the standard a weighting of zero when making the allotment. The statutory direction to "consider" three different standards when allotting a quota does not mean that the Secretary must base his allotment on all three standards when he has considered them and determined that one of them is capable of application only in such a limited manner that it would not contribute to a fair, efficient, and equitable distribution.[23]

Quite aside from the fact that the Secretary's conclusion that the standard should be given a zero weighting was reasonable, it clearly did not prejudice the respondents. The standard refers to processings of sugar from proportionate-share sugarcane. With few exceptions, the only sugar processed from sugarcane is raw sugar, and the processing occurs at the various raw sugar mills. The raw sugar is then sold by the raw mills to the refiners and is refined by them into direct-consumption sugar. The refined sugar is therefore ordinari-

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[23] An example of a situation in which the "processings" standard may be and customarily is applied is the allotment of the general sugar quota in Puerto Rico (as distinguished from the direct-consumption portion of the quota). The allotments are made to the raw mills, where the first marketing of sugar occurs. Those mills process raw sugar from sugarcane, and their allotments may readily be based in part upon the extent to which the sugarcane processed is sugarcane to which proportionate shares pertained.

ly not processed directly from sugarcane, but is processed from raw sugar that was itself processed from sugarcane. The refining process is one step removed from the processing of the sugarcane. The Secretary has heretofore construed the statutory standard to refer only to the processing of the sugarcane and not to the processing of the raw sugar. The court below said that the construction is a proper one (R. 196-197).

The three largest refiners in Puerto Rico (the competing parties in this action), which normally market 90 percent of the direct-consumption portion of the Puerto Rican sugar quota, do not process sugar directly from sugarcane. They buy their supplies of raw sugar from various raw sugar mills rather than process it themselves. Consequently, if this standard were given any weight, it would apply only to the three refiners that market less than 10 percent of the direct-consumption sugar quota.[24] The allotment of a quota upon the basis of a standard that would not apply to the refiners of 90 percent of the direct-consumption sugar would be neither fair nor efficient nor equitable.

Furthermore, the three refiners that market less than 10 percent of the direct-consumption portion of the sugar quota actually process large quantities

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[24] P. R. S. O. No. 17, 6 F. R. 2410, which allotted the 1941 general sugar quota for Puerto Rico (not the direct-consumption portion of the sugar) listed 32 processors and only three of them (Aguirre, Guanica, and San Francisco) were eligible to participate in the allotment of the direct-consumption portion of the quota (see P. R. S. O. No. 16, 5 F. R. 4748).

of raw sugar from sugarcane. Two of them (Aguirre and Guanica) are the second and fourth largest producers of raw sugar in the island, and each produces almost as much raw sugar as the entire direct-consumption portion of the quota. Appendix B. Most of the raw sugar is not refined by them (R. 147, 150). If their allotments of direct-consumption sugar had been based upon such processings of raw sugar from sugarcane,[25] the allotments would have been grossly disproportionate to their actual marketings of direct-consumption sugar and the relationships existing between the various refiners would have been completely distorted.

The respondents were not prejudiced by the Secretary's conclusion that no weight would be given to the standard, because they process no raw sugar from sugarcane and would have received no advantage or benefit from the use of the standard. They did not urge that any weight be given the standard during the administrative proceedings before the Secretary, and first made the contention before the Court of Appeals. They would seem to have no standing to attack the allocation on this ground.

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[25] All sugarcane grown and processed in Puerto Rico from 1942 through 1948 (and also in 1949) was sugarcane to which proportionate shares pertained. Proportionate shares were not restrictive during that period. The Secretary determined that the proportionate share of each farm would be equivalent to the quantity produced on the farm.

D. THE SECRETARY DID NOT APPLY AN EXTRA-STATUTORY STANDARD UNAUTHORIZED BY LAW.

The respondents contended in the court below, and the contention is repeated here (Br. in Op. 8-9), that the controlling standard used by the Secretary when allotting the quota was the restoration of prewar competitive relationships between the three principal refiners, and that the standards of past marketings and ability to market were used as mere cloaks for the unauthorized standard actually used. The contention is based upon an inference from the fact that the 1948 allotments were roughly comparable to the 1941 allotments.

This is an argumentative statement regarding the motives of the Secretary. As has been demonstrated, the Secretary's decision was based upon the controlling standard prescribed by the Act—i.e., a "fair, efficient, and equitable" distribution of the quota. The fact that the distribution made by the Secretary approximated the quotas for 1941 is a coincidence.

Any period of past marketings necessarily reflects the competitive status of the refiners during the period chosen. A prewar period was chosen by the Secretary, not because of the particular competitive relationship that existed then, but because marketings during the succeeding war period did not provide a fair base for allotments. Moreover, the Secretary's method of measuring ability to market obviously was not intended to restore a

competitive relationship that existed at any particular time, because each refiner's ability to market was measured by its highest marketings during a period of years and the peak performance for all refiners did not occur in the same year.

II. THE STATUTORY LIMITATION ON THE PORTION OF THE GENERAL SUGAR QUOTA FOR PUERTO RICO THAT MAY BE FILLED WITH DIRECT-CONSUMPTION SUGAR DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The respondents in No. 27 and No. 30 and the Government of Puerto Rico, the petitioner in No. 32, contended in the court below that the statutory limitation on the portion of the general sugar quota for Puerto Rico that may be filled with direct-consumption sugar is invalid because it violates the due process clause of the Fifth Amendment. The Court of Appeals refrained from deciding the issue because the Secretary's order was reversed on other grounds. The respondents and the Government of Puerto Rico contend in this Court that they are entitled to an adjudication of that issue, that it was error for the Court of Appeals to refrain from deciding it, and that the issue should now be decided by this Court.

The contention is advanced by the Government of Puerto Rico in its petition in No. 32 and by the respondents in their brief in support of the petition. The respondents did not themselves cross-petition for a writ of certiorari; however, in their

brief in opposition in No. 27 and No. 30 they announced their intention to support the judgment of the court below on the basis of their contention regarding the unconstitutionality of the statutory limitation (Br. in Op. 11). If the Government's contention that the Secretary properly interpreted and applied the statutory standards governing allotments is correct, the Constitutional issue will need to be decided.

The status of the Government of Puerto Rico to maintain a review proceeding in this Court has been challenged by the American Sugar Refining Company, *et al.*, intervenors in the court below, on the ground that the Government of Puerto Rico has no justiciable interest in the constitutional issue (Br. in Op. 14-15). The justiciable nature of Puerto Rico's interest in the issue is not free from doubt. *Massachusetts* v. *Mellon*, 262 U. S. 447; *Florida* v. *Mellon*, 273 U. S. 12; *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 446; *National Bank* v. *County of Yankton*, 101 U. S. 129; *Mormon Church* v. *United States*, 136 U. S. 1; *Inter-Island Steam Navigation Co.* v. *Hawaii*, 305 U. S. 306. However, the constitutional issue is also raised by the respondents in No. 27 and No. 30, and their interest in the issue is clearly justiciable.

A. THE STATUTORY LIMITATION ON THE DIRECT-CONSUMPTION PORTION OF THE SUGAR QUOTA FOR PUERTO RICO IS AN INTEGRATED PART OF THE SUGAR ACT OF 1948.

The Sugar Act restricts the amount of sugar that may be marketed in the continental United States each year to an amount determined by the Secretary on the basis of the needs of consumers. In order to give fair access to the consumer market thus limited, the Act fixes a quota for the amount of sugar that may be marketed in the continental United States from each sugar-producing area. The sugar-producing areas are classified into two groups—domestic and foreign. The domestic producing areas consist of two areas on the mainland and three territories. The principal foreign sugar-producing areas are Cuba and the Republic of the Philippines (section 202 of the Act).

The quotas are general ones limiting the amount of sugar that may be marketed in any form, either raw or refined, from each area of supply. However, the general quotas for the principal offshore areas, both domestic and foreign, are qualified by section 207 of the Act which limits to a portion of each quota the amount that may be filled in the form of refined sugar. The balance of each quota must be filled with raw sugar, which is then refined by the refiners on the mainland before being sold to consumers. No comparable limitation is placed upon the quota for the mainland cane sugar area because all the raw sugar processed from the

sugarcane grown in the area that is refined is refined by the mainland refiners. No comparable limitation is placed upon the quota for the domestic beet sugar area because there is no intermediate raw sugar stage in the processing of sugar beets. Sugar beets are processed directly into refined sugar, and the sugar is therefore marketed only in that form.

Clearly, the purpose of the limitations in section 207 is to distribute among the mainland refiners and the offshore refiners the opportunity to refine the limited quantity of sugar permitted to be marketed under the general quotas. The mainland refiners obtain most of their raw sugar supplies from the offshore areas. If the full amounts of the quotas for offshore areas could be imported in refined form, the mainland refiners would lose to the offshore refiners their major sources of supply of raw sugar. By limiting the portions of the quotas for the offshore areas that may be filled with refined sugar, section 207 assures a division of the restricted raw sugar supplies between the two groups.

These limitations are part of an integrated system governing the marketing of all sugar. The Sugar Act of 1948 is designed to stabilize the entire sugar industry, including both the production and the refining of sugar, and to protect the interests of consumers. The regulatory scheme adopted is not restricted to the production or marketing of

raw sugar. Control over the marketing of refined sugar is a part of the entire plan of regulation. The Congressional purpose to regulate the marketing of all sugar in the interests both of consumers and of the entire sugar industry is clearly indicated. The report of the House Committee on Agriculture on the bill that became the Sugar Act of 1948 said: "Like its predecessors the Jones-Costigan Sugar Act of 1934 and the Sugar Act of 1937, the bill has as its primary objective the *stabilization of the sugar producing, refining, and importing industries.*" H. Rep. No. 796, 80th Cong., 1st Sess., p. 1. And the Act itself directs the Secretary, when determining the amount of sugar needed by consumers, to make his determination in a manner that will "protect the welfare of consumers *and of those engaged in the domestic sugar industry*" and to determine an amount that will provide "such supply of sugar as will be consumed at prices which will not be excessive to consumers *and which will fairly and equitably maintain and protect the welfare of the domestic sugar industry*" (Sec. 201) (italics supplied). The refiners are a part of the "sugar industry."

Regulation of the marketing of refined sugar from offshore areas has been an integral part of sugar control legislation since its inception. The background of the legislation is not adequately indicated by a recital of the evils that afflicted the portion of the industry involved in the production

of raw sugar. The remedy for those evils must be considered in the light of the impact of the remedy upon the refining part of the industry; and the Congressional purpose to deal with the problems of the entire industry is clear from the explicit statement quoted above and from the regulatory scheme adopted. Congress might have restricted its regulatory scheme to one designed to benefit only producers and consumers of sugar, ignoring the problems of the refiners, but it did not do so. It chose to adopt a more comprehensive scheme that recognized the position of the refiners as an essential part of the domestic sugar industry, and that deals with their problems as well as with the problems of producers and consumers.

B. THE STATUS OF PUERTO RICO.

Puerto Rico is an unincorporated territory of the United States—a territory that belongs to the United States but has not been incorporated as a part of the Union of States. The cases do not leave that point open to doubt. The distinction between incorporated and unincorporated territories was first announced and applied in *Downes* v. *Bidwell*, 182 U. S. 244, where the Court held that Puerto Rico is a territory not incorporated in the United States and therefore not subject to the requirement that taxes be uniform throughout the United States. As recently as 1945, this Court reaffirmed the holding. In *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 673, the Court said:

> That our dependencies, acquired by cession as the result of our war with Spain, are territories belonging to, but not a part of, the Union of states under the Constitution, was long since established by a series of decisions in this Court beginning with *The Insular Tax Cases* in 1901; *De Lima* v. *Bidwell, supra; Dooley* v. *United States, supra,* 182 U. S. 222; *Downes* v. *Bidwell,* 182 U. S. 244; *Dooley* v. *United States,* 183 U. S. 151; and see also *Public Utility Commissioners* v. *Ynchausti & Co.,* 251 U. S. 401, 406-407; *Balzac* v. *Porto Rico, supra.* This status has ever since been maintained in the practical construction of the Constitution by all the agencies of our government in dealing with our insular possessions.

See also *Balzac* v. *Porto Rico,* 258 U. S. 298; *Puerto Rico* v. *Shell Co.,* 302 U. S. 253, 257; *National Labor Relations Board* v. *Gonzalez Padin Co.,* 161 F. 2d 353, 355 (C. A. 1); *Buscaglia* v. *Ballester,* 162 F. 2d 805, 807 (C. A. 1); Willoughby on the Constitution, 2d ed., Chapters XXX and XXXI.

When dealing with a territory, Congress has full, plenary, sovereign power, which stems from the territorial clause of the Constitution.[26] Under

[26] "It is no longer doubted that the United States may acquire territory by conquest or by treaty, and may govern it through the exercise of the power of Congress conferred by § 3 of Article IV of the Constitution 'to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.' *Dooley* v. *United States, supra,* 183 U. S. at 157; *Dorr* v. *United States,*

this power Congress may legislate for the territories in any manner it considers wise and in the public interest. The public interest includes both the interest of the territory and the interest of the United States.

The Government does not, of course, contend that the power of Congress over a territory is absolute and despotic. This Court pointed out in *Downes* v. *Bidwell*, 182 U. S. 244, that the Constitution contains some provisions that are absolute withdrawals of power from Congress in favor of human liberty, and that in the exercise of a specifically granted power Congress may not transcend such limitations. These absolute prohibitions of power were not identified, but it is a fair inference that they were intended to include the due process clause of the Fifth Amendment, which provides that no person shall be deprived of liberty or property without due process of law.

The precise issue in the present case is whether Congress, in the exercise of its plenary power to govern a territory and to regulate its commerce, may regulate the economy of the territory differently from the economy of the United States, and in furtherance of its conception of sound public

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195 U. S. 138, 149; *Balzac* v. *Porto Rico*, *supra*, 305; *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 323; *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 673-4. See also *Mormon Church* v. *United States*, 136 U. S. 1, 42; *De Lima* v. *Bidwell*, 182 U. S. 1, 196; *United States* v. *McMillan*, 165 U. S. 504, 510; *National Bank* v. *County of Yankton*, 101 U. S. 129, 133.

policy limit the importation into the United States of sugar refined in the territory.

C. THE DUE PROCESS CLAUSE DOES NOT PRECLUDE A LIMITATION ON THE IMPORTATION OF SUGAR FROM PUERTO RICO AND OTHER OFFSHORE AREAS THAT IS DESIGNED TO PROTECT A SEGMENT OF THE DOMESTIC REFINING INDUSTRY.

It is beyond dispute that Congress has the power to limit the amount of goods that may be imported into the United States from a foreign country, or even to impose an absolute embargo upon such importation, whenever it believes the limitation or exclusion would be in the public interest. The power is derived from the authority to lay and collect taxes and import duties, and the power to regulate commerce with foreign nations (Art. I, § 8). *Buttfield* v. *Stranahan*, 192 U. S. 470; *Hampton & Co.* v. *United States*, 276 U. S. 394.

The authority of Congress to limit imports into the United States is not restricted to imports from foreign countries. It also extends to imports from the territories that are not incorporated in the United States. In *Downes* v. *Bidwell*, 182 U S. 244, the Court sustained the validity of a duty upon imports from Puerto Rico. That was the precise issue decided by the Court, and the holding was cited with approval in the recent case of *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 674. In the latter case the Court, holding that goods shipped to

the United States from the Philippines while they were still a territory were imports within the tax power of Congress and consequently were not subject to taxation by a state, pointed out that:

> Congressional legislation governing trade relations of the United States with the Philippines * * * has often treated articles brought from the Philippines to the United States as imports [p. 678].

and that:

> Our tariff laws in their practical operation have in general placed merchandise brought from the Philippines into the United States in the same relationship to the constitutional taxing power of the national government and the states as articles brought here from foreign countries [p. 678].

The Court concluded:

> Congress is free, as in the case of other imports, to regulate the flow of merchandise from the Philippines into the United States by the imposition of either customs duties or internal revenue taxes [p. 679].

In the light of this case, it is clear that Congress may limit or prohibit the importation of goods from a territory in the same manner and to the same extent that it may deal with goods coming from foreign countries. What Congress may do indirectly, by an exercise of the tax power, it may do directly, by an exercise of its plenary powers

under the territorial and commerce powers. Cf. *Buttfield* v. *Stranahan*, *supra*, at p. 492-493.

It has long been settled that Congressional limitation of imports into the United States for the purpose of encouraging a domestic industry presents no due process problem. *Hampton & Co.* v. *United States*, 276 U. S. 394, 411-412; *Buttfield* v. *Stranahan*, 192 U. S. 470, 493.

The principle is as applicable to imports from a territory as to imports from foreign countries. In *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, the Court sustained the validity of a tax imposed upon the first domestic processing of coconut oil imported from the Philippines. The validity of the tax was challenged on the ground that it was imposed for the purpose of protecting industries in this country from competition by industries in the territory. The contention was rejected by the Court in these words (p. 320):

> The tax itself, it is said, was imposed for the purpose of protecting certain industries in this country; and it is challenged on that ground. That Congress has power to levy a tax with the collateral purpose of thereby protecting the industries of the United States is no longer open to doubt. *Hampton & Co.* v. *United States*, 276 U. S. 394, 411.

The Court also pointed out (p. 320) that Congress properly may balance the interests of the people in a territory against the interests of the people in the continental United States, and that the extent

of the relief afforded to one or the other is a matter "not for judicial but for Congressional consideration and determination." [27]

Section 207 of the Sugar Act of 1948 limits the amount of refined sugar that may be imported from Puerto Rico and other offshore areas. The limitations are parts of the general quotas for the areas. The purpose and the effect of the limitations are to make the balance of the general quotas available to the mainland refiners for processing, and thus distribute among the mainland and offshore refiners the opportunity to refine the limited quantity of sugar permitted to be marketed. The limitation in section 207 is closely analogous to a protective tariff designed to protect the mainland industry against unrestricted competition from foreign and territorial refiners. The validity of such legislation under the tax power would be clear, and the validity of the limitation in the Sugar Act under the territorial power, or commerce power, is equally clear.

In addition to *Downes* v. *Bidwell* and *Cincinnati Soap Co.* v. *United States, supra*, which involved a regulation of commerce between territories and

[27] "It is not improbable that a failure to exercise control over imports [into the United States] from the Philippines [while they were still a territory] would injuriously affect the industries of this country; and, on the other hand, an exercise of the power to tax imports might prove injurious to the people of the islands. Congress, in passing the legislation here under consideration, is not forbidden to balance these respective probabilities." *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 320.

states by means of the tax power, there are other examples of valid Congressional controls over such commerce that favor the residents of the one or the other area. Thus, Congress may deny to residents of a territory rights given to residents of states to utilize foreign ships for the transportation of goods between points in the United States. *Alaska* v. *Troy*, 258 U. S. 101. Residents of territories were required by the statute under review to use domestic ships for that purpose even though foreign transportation might be available at lower rates. The legislation was assumed by the Court to discriminate against the residents of the territory.

Congress may prohibit residents of one territory (Alaska) from importing into the territory intoxicating liquors, without imposing similar restrictions upon the residents of the other territories or states. *Endleman* v. *United States*, 86 Fed. 456 (C. A. 9).

Congress may by delegation to the Puerto Rican legislature[28] prohibit the shipment from Puerto Rico to the continental United States of distilled spirits in containers holding more than one gallon. *Bacardi Corp.* v. *Domenech*, 311 U. S. 150. The purpose of the legislation was to benefit the territorial distilling industry by requiring liquor to be bottled locally rather than exported in bulk for

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[28] "Both the territorial and federal laws • • • are creations emanating from the same sovereignty." *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 264.

bottling in the states. The effect necessarily was to discriminate against the distilling industry in the states. When upholding the statute, this Court said that the legislature could "have absolutely interdicted * * * exportation from the Island" (p. 168). The greater power to prohibit includes the lesser power to limit.

It is immaterial from the standpoint of the due process clause whether the challenged legislation favors the residents of the territory or the residents of the states. Legislation favoring the one group discriminates against the other, and if the due process clause does not prohibit discrimination in the one case it does not do so in the other. There is no significant difference between the validity of legislation prohibiting or limiting the shipment of distilled spirits from Puerto Rico to the states for the purpose of protecting the territorial distilling industry and legislation limiting the shipment of refined sugar from Puerto Rico to the states for the purpose of protecting the mainland refining industry.

D. THE STATUTORY LIMITATION ON THE DIRECT CONSUMPTION PORTION OF THE SUGAR QUOTA FOR PUERTO RICO IS NOT AN "INVALID ABRIDGMENT OF THE LIBERTY OF PERSONS IN PUERTO RICO TO AND WITHIN THEIR TRADE."[29]

The Government of Puerto Rico contended at length in the court below, and an outline of the argument is repeated in its Petition for a Writ of Certiorari, that citizens of Puerto Rico are guaranteed the "ancient and established right of a trade," and that section 207(b) of the Sugar Act of 1948 denies or abridges the liberty of persons in Puerto Rico to and within their trade without due process of law. Although the brief for Puerto Rico did not identify in words the liberty of trade that allegedly is abridged, Puerto Rico is presumably talking about the right of a person in Puerto Rico to engage in the business of refining and marketing sugar.

Nothing in section 207(b) of the Act denies or abridges the right of any person in Puerto Rico to engage in the sugar business. It places no restriction on the right of any person to engage in the production of sugarcane. No restriction is placed upon the right of any person to build a new refinery and engage in the business of refining sugar from sugarcane. There is no restriction on the right of an existing refinery to enlarge or expand its plant. And there is no restriction on the right

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[29] This phrase is from the brief of the Government of Puerto Rico in the court below.

of any refiner in Puerto Rico to market his sugar anywhere in the world, except in the continental United States. If he chooses to market his sugar in the continental United States, he must do so in accordance with a quota system that applies to all areas of supply for that market. A limitation of that character is not an abridgment of the ancient and established right of a person to a trade, as that concept has developed historically.

The contention of Puerto Rico thus amounts to a contention that all persons in Puerto Rico have an ancient and established right to refine sugar from sugarcane grown on the island and to market the refined sugar in the continental United States. Apparently Puerto Rico recognizes that the right is subject to some limitation, because it concedes that the general quota prescribed by the Act limiting the total amount of Puerto Rican sugar, either raw or refined, that may be marketed in the continental United States is not an invalid abridgment of this "ancient and established right to a trade." The general quota for Puerto Rico prior to adjustment is 910,000 short tons, and standing alone it fixes the maximum amount of refined sugar from Puerto Rico that may be marketed in the continental United States. Puerto Rico concedes that this limitation is valid; it contends only that the provisions of section 207(b) fixing a lower maximum (126,033 short tons) for the amount of refined sugar that may be marketed is invalid. That

is, a 910,000 ton limitation is not alleged to be an abridgment of the ancient right to a trade, but a 126,033 ton limitation is.

When stated in these terms, it is apparent that the lengthy discussion in the Puerto Rican brief of the ancient and established right of citizens to their trade is confusing rather than helpful in a determination of the Constitutional validity of the legislative limitation. The issue is not one of freedom to engage in a trade; such freedom concededly is subject to limitation. The issue is whether the due process clause precludes Congress from distinguishing between and imposing different limitations upon the rights of all refiners of sugarcane grown in a territory, on the one hand, and the rights of all refiners of sugarcane grown in the states on the other hand, to market in the continental United States the sugar refined by them. A discussion of the general right to engage in a trade contributes nothing to a resolution of the issue.

It should be noted that the statutory limitations are not imposed upon the citizens or residents of either area. They limit the marketing of sugar produced from sugarcane or sugar beets grown in each area without regard to the status of the person who does the marketing. A citizen or anyone else residing in Puerto Rico and a citizen or resident of a state are subject to the same limitation when they refine in Puerto Rico sugarcane grown in that territory. For example, if a resident of

Florida should build a sugar refinery in Puerto Rico, he would be subject to the same limitation on the marketing of refined sugar in the continental United States that applies to resident Puerto Ricans. Likewise, if a resident Puerto Rican should build a refinery in one of the states, he would be subject to the same limitation that applies to all other persons marketing sugar refined on the mainland.

It should also be noted that the discussion of "ancient liberties" in the brief for Puerto Rico is in extremely general terms, and does not relate the right to engage in a trade to the precise issue involved. The brief does not particularize what is meant by the phrase "the right of a man to, and liberty within, his trade." Assertedly, that right was recognized while Puerto Rico was governed by Spain. But what did the right include? Apparently it did not include the right to market territorial products in Spain without discrimination because the brief points out that such imports were subject to the imposition of preferential duties of long standing. The brief also asserts that citizens of Puerto Rico have acquired by grant from the United States the "right to a trade" that was evolved in English common law. Again, the pertinent inquiry is, what does the right include? How does the right bear on the power of Congress to regulate trade between a territory and a state? Those questions are not discussed or answered.

Vague statements about the right to enter a trade of one's choice, freedom of action within the trade, free access to an open market, ancient liberties, and inalienable liberties are assumed to apply to the facts of this case. That assumption is nowhere demonstrated.

Each of the rights stated in these general terms is, in fact, subject to regulation and restriction. As a single example, the free access to an open market for agricultural producers is substantially restricted by the marketing quota provisions of the Agricultural Adjustment Act of 1938, 52 Stat. 31, as amended, 7 U. S. C. 1281 *et seq.*, which were sustained in *Mulford* v. *Smith*, 307 U. S. 38, and in *Wickard* v. *Filburn*, 317 U. S. 111. None of the cases heretofore cited by Puerto Rico in its discussion of this point has any bearing upon the validity of the type of restriction involved in the present case—a uniform restriction on the right of all persons to market in the continental United States sugar refined from sugarcane grown in the territory of Puerto Rico.

E. THE RECORD DOES NOT SHOW THAT THE DIRECT-CONSUMPTION PORTION OF THE PUERTO RICAN QUOTA IS DISCRIMINATORY WITHIN THE MEANING OF THE DUE PROCESS CLAUSE.

Assuming, *arguendo*, that a regulation of commerce between Puerto Rico and the states must not discriminate arbitrarily against the inhabitants of

the island as a group, the record in this case shows no such discrimination.

The authority of Congress to restrict by a quota system the shipment of agricultural commodities in interstate or foreign commerce in order to maintain a proper balance between available supplies and the demands of consumers, and thereby minimize abnormal surpluses, shortages, and price fluctuations, is no longer open to controversy, provided only that the restriction be not so discriminatory as to violate the due process clause. In the Agricultural Adjustment Act of 1938, as amended, 52 Stat. 31, as amended, 7 U. S. C. 1281 *et seq.*, Congress restricted such shipments, and the validity of the legislation has been sustained by the Court as a permissible exercise of the commerce power. *Mulford* v. *Smith*, 307 U. S. 38; *Wickard* v. *Filburn*, 317 U. S. 111. The purpose of the Sugar Act of 1948 is comparable to that of the Agricultural Adjustment Act of 1938 in that it is designed to establish a proper balance between supply and demand, and the inclusion of both states and territories within the quota system presents no additional question insofar as the power of Congress is concerned. The territorial power is broader than the commerce power.

A quota system by definition differentiates between geographical areas and between individuals within those areas. Consequently, the mere imposition of quotas that are different does not *per se*

violate the due process clause. The respondents apparently recognize this fact, for they do not contend that the mere imposition of different general sugar quotas for the various areas of supply (500,000 short tons for the two states comprising the mainland cane sugar area, 1,800,000 short tons for the states (approximately 20) comprising the domestic beet sugar area, and 910,000 short tons for Puerto Rico) is discriminatory on its face. Hence, in order to sustain their contention the respondents must demonstrate affirmatively the discriminatory nature of the quotas. This they have failed to do.

The only evidence of discrimination relied upon by the respondents in the court below consisted of statements by various executive officials and by members of Congress opposing the legislation when the sugar legislation was under consideration. Those statements characterized the direct-consumption portion of the quota for Puerto Rico as "discriminatory." They are of no significance in this proceeding, however, because they are mere individual predictions of the effect the proposed legislation would have if enacted into law, and are not evidence of the actual effect of the statute when applied to the facts of this particular case. As this Court said in *Downes* v. *Bidwell*, 182 U. S. 244, 254:

> The arguments of individual legislators are no proper subject for judicial comment. They

> are so often influenced by personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of the persons who make them, much less as dictating the construction to be put upon the Constitution by the courts.

Aside from the wisdom of the legislation, it is submitted that the limitation on the direct-consumption portion of the sugar quota for Puerto Rico has a reasonable historical basis. The Act is designed simply to preserve the pattern of marketing as between areas which prevailed when sugar control legislation was first adopted. Prior to the adoption of sugar control legislation, all sugar refined from sugarcane grown in mainland areas of supply was refined in those areas. Moreover, most of the sugar imported from offshore areas was imported in raw form and further refined on the mainland before being marketed to consumers. When Congress first adopted sugar control legislation, it provided for a quota system that would preserve that pattern of marketing. Under the Jones-Costigan Act of 1934, 48 Stat. 670, 7 U. S. C. 608a, 609, 611, the Puerto Rican direct-consumption sugar quota was fixed at a figure equal to the largest quantity of direct-consumption sugar shipped from Puerto Rico to the United States during any one of the preceding three years. The same standard was used for determining the refined sugar quotas for the other territories and

possessions. The amount of the refined sugar quota for Puerto Rico according to that standard was computed to be 126,033 short tons, raw value.[30] No direct-consumption limitation was placed on the quotas for the two areas on the mainland because none was needed. The refining of the raw sugar produced in the mainland cane sugar area is always done by mainland refiners, and sugar from the domestic beet sugar area is produced in a single process, with no intervening "raw" stage as in the processing of sugarcane.

Thus, the direct-consumption sugar quotas first established under the 1934 legislation were designed to maintain the status quo between the refiners in Puerto Rico and the refiners in the states. The Puerto Rican refiners were allowed to refine and send to the continental United States the maximum amount of direct-consumption sugar they had previously shipped, and the continental refiners were allowed to refine the remainder of the Puerto Rican raw sugar shipped to the states and all cane sugar[31] produced in the states, as they had done prior to the passage of the legislation. Quotas computed in that manner were not arbitrary and discriminatory.

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[30] General Sugar Quota Regulations, Series 1, p. 4, June 9, 1934; General Sugar Quota Regulations, Series 2, Revision 1, p. 4, August 17, 1935.

[31] Because of the method of processing sugar beets, none of the beets from the beet sugar area are an available source of supply for the continental refiners of sugarcane.

The same limitations on direct-consumption sugar were continued in succeeding legislation, and they are included in the present Act. Congress has thereby maintained the status of the Puerto Rican refiners that existed immediately prior to 1934.

Although the Sugar Act does not limit the portions of the quotas for the two continental areas that may be marketed in the form of direct-consumption sugar, the general quotas are as much a limitation upon the mainland refiners as the Puerto Rican direct-consumption quota is a limitation upon the Puerto Rican refiners. The general quotas for the mainland areas, and for all other areas of supply, restrict the total sources of supply of raw sugar that are available to the mainland refiners for domestic consumption. They may not refine raw sugar from non-quota areas and market it in the United States, and they may not market over-quota sugar from a quota area. After they have exhausted the raw sugar supplies available to them under the general quotas prescribed by the Act, they may not acquire any more sugar for domestic consumption. Thus, the mainland refiners are restricted by the limitations imposed upon their sources of supply, while the Puerto Rican refiners are restricted by the limitation upon the amount of direct-consumption sugar they may ship.[32]

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[32] This effect was recognized and discussed at the Congressional Hearings on the bill that became the Sugar Act of 1937.

The limitation upon the mainland refiners' sources of supply is a flexible one which increases or decreases in accordance with the Secretary's determination of consumer needs. If those needs increase, the general quota for Cuba (which has the major residual quota) increases and the quantity of raw sugar available to the mainland refiners is thereby increased. Conversely, if consumers' needs decrease, the quota for Cuba decreases and the refiners' sources of supply decrease. The Puerto Rican refiners, however, are not affected by this factor because they are given the right to market in the states the 126,033 short tons prescribed by the Act regardless of the total consumers' needs determined by the Secretary.

In actual experience, the restriction on the mainland refiners has been more severe than the restriction on the Puerto Rican refiners. Under the present Act and its predecessors, the Puerto Rican refiners have been authorized to market in the continental United States a maximum of 126,033 short tons, raw value, of direct-consumption sugar each year. That is the largest quantity ever marketed by them, and the record was established in the year

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Hearings before Senate Committee on Finance, 75th Cong., 1st Sess., on H. R. 7667, p. 73: "There is a quota on continental refining because the quota law says that all persons who want to refine sugar on the continent can buy only a certain amount of raw sugar. That just as effectively imposes a refining quota upon the continent as would a specific sentence saying literally that the total refined sugar output of the continent shall not exceed so many tons raw value, or a stated percentage of total consumption."

1933. In the preceding four years the quantity marketed ranged from 64,000 tons to 103,000 tons, and in 1934 the quantity dropped to 105,000 tons. See Appendix I. In contrast, the largest quantity of refined sugar distributed in the continental United States by the mainland refiners in the years immediately prior to the enactment of quota legislation was 5,356,000 tons, in 1929. That quantity was 76.9 percent of the total quantity distributed. During the depression years when total distribution declined, the quantity distributed by the mainland refiners fell to 4,020,000 tons in 1933, or 63.6 percent of the total quantity distributed. During each of the years when quotas were in effect under the Jones-Costigan Act and the Sugar Act of 1937,[33] with one exception, the mainland refiners distributed less than the quantity distributed in the pre-quota year 1929. The exception was the year 1941, preceding this country's entry into the war, when the total distribution of sugar reached the unusually high figure of 8,069,000 tons. In 1948, when quotas were again imposed after the war, they distributed 5,077,000 tons, which was 69.1 percent of the total, and under the 1949 quotas as revised on June 10, 1949, they will be able to obtain no more than approximately 4,950,000 tons, or 68.3 percent of the total, which is still below the quantity they distributed in 1929 and 1930. Appendix I.

[33] Quotas were in effect from 1935 to 1941, inclusive, except during the periods September 11, 1939 to December 31, 1939, and February 29, 1940 to October 15, 1940.

Thus, while the Puerto Rican refiners have been authorized to refine and market in the continental United States as much sugar as they marketed in their peak pre-quota year, the residual supplies of raw sugar available to the mainland refiners under the quota legislation have not been large enough to permit them to market a quantity equal to the quantity marketed by them in their peak pre-quota year.

The challenge of the respondents and of the Government of Puerto Rico is in reality directed to the wisdom of section 207(b) of the Sugar Act of 1948 rather than to the power of Congress to enact it, and their contentions should properly be addressed to Congress rather than to this Court. If the Congressional power exists, the motives for its exercise are not subject to judicial cognizance. *Hampton & Co.* v. *United States*, 276 U. S. 394; *Chicago, B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549, 569; *Nebbia* v. *New York*, 291 U. S. 502, 537.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be reversed and that the order of the Secretary of Agriculture should be affirmed.

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SEPTEMBER, 1949.

APPENDIX A

COMPARATIVE TABULATION OF PRODUCTION FOR THE CRUCIAL YEAR OF 1944 WITH REFERENCE TO THE CROP OF 1943

Factories	Tons 96° Sugar 1942-43	Tons 96° Sugar 1943-44	Percentage 96° Sugar elab'd 1944 in Relation to 1943	Percentage Change of 1944 Crop from 1943 Crop
Cambalache	42 472 04	28 091 00	67 552	−32 448
Canovanas	38 248 94	24 510 51	64 082	−35 918
Carmen	20 093 72	13 215 39	60 883	−39 117
Constancia-Toa	19 414 41	14 183 25	73 055	−26 945
Juanita	24 071 56	13 831 06	55 589	−44 411
Los Canos	20 922 67	16 850 18	80 535	−19 465
Monserrate	16 378 82	12 524 45	76 467	−23 533
Plazuela	26 297 93	19 776 00	75 200	−24 800
Rio Llano	11 677 13	9 125 41	78 148	−21 852
San Vicente	34 453 50	22 451 85	65 166	−34 834
San Jose	15 915 19	10 023 09	62 978	−37 022
Victoria	21 742 41	12 817 32	59 748	−40 252
Total	291 458 34	197 909 53	61 758	−38 242
El Ejemplo	12 323 67	5 257 90	42 665	−57 335
Fajardo	56 955 47	33 201 35	58 293	−41 707
Pasto Viejo	32 720 03	24 993 50	75 479	−24 521
Roig	27 151 97	20 690 67	76 092	−23 908
Total	129 151 14	83 813 42	64 896	−35 104
Aguirre	85 086 56	61 310 17	72 096	−27 904
Boca Chica	19 710 27	11 782 79	59 779	−40 221
Caribe	10 118 92	8 367 29	82 689	−17 311
Constancia-Ponce	7 389 06	5 011 97	67 830	−32 170
Guamani	12 387 98	10 011 40	80 835	−19 165
Guanica	116 915 96	81 732 65	69 907	−30 093
Lafayette	29 075 89	24 345 49	83 732	−16 268
Machete	22 838 93	17 260 69	75 576	−24 424
Mercedita	41 706 81	37 333 84	89 515	−10 485
Rufina	31 937 12	24 827 88	77 738	−22 262
San Francisco	6 250 13	5 584 20	89 345	−10 655
Total	383 370 19	287 568 40	75 010	−24 990
Coloso	41 626 24	31 323 07	75 248	−24 752
Igualdad	38 427 38	25 772 36	67 067	−32 933
Eureka	31 571 87	19 174 05	60 728	−39 272
Rochelaise	11 900 13	5 302 11	46 235	−53 765
Total	123 525 82	81 771 79	66 198	−33 802
Cayey	12 152 45	6 828 80	56 192	−43 808
Herminia	1 992 32	1 828 82	91 793	− 8 207
Juncos	31 441 45	15 618 40	49 674	−50 326
Pellejas	4 679 00	2 303 88	49 239	−50 761
Plata	18 889 62	15 858 81	83 995	−16 005
Santa Barbara	3 517 75	1 507 43	42 853	−57 147
Santa Juana	32 229 52	22 953 91	71 220	−28 780
Soller	6 840 19	5 558 18	81 257	−18 743
Total	111 733 30	72 458 90	64 850	−35 150
Grand Total	1 039 238 77	723 612 04	69 629	−30 371

Source: Government of Puerto Rico, Public Service Commission, Sugar Technology Division, Bulletin No. 1, Annual Synopsis of Cane Sugar Manufacturing Data, 1943 and 1944, Table XIII. The percentage changes have been computed and added to the table.

(Here follows Appendix B and C)

CROP YEAR PRODUCTION

(Short

	1937-38	1938-39	1939-40	194
Aguirre	1/ 158	90.266	101.851	94
Caribe	457	5.886	9.159	9
Central Aguirre Sugar Co.	129.615	96.152	111.010	103
Cambalache	49.405	41.082	49.518	41
Plazuela	33.174	19.676	23.940	21
Land Authority of Puerto Rico	82.579	60.758	73.294	62
Canovanas	40.950	29.401	36.508	34
Fajardo	67.563	56.315	63.432	58
Fajardo Sugar Co. of Puerto Rico	107.913	85.716	99.940	91
Central Coloso, Inc.	42.302	36.633	45.229	39
Constancia Ponce				
Corp. Azucarera Sauri & Subira	9.502	7.089	8.665	7
Constancia Toa				
Cia. Azucarera del Toa	27.517	21.120	28.677	23
Eastern Sugar Associates	119.853	83.145	101.116	93
El Ejemplo	16.896	11.896	11.859	10
Roig	35.093	25.014	28.659	29
Antonio Roig, Sucesores, S. en C.	51.899	36.820	40.518	39
Central Eureka, Inc.	10.515	18.899	25.045	24
Guamani				
Suc. de Jose Gonzales & Co., S. en C.	14.715	10.432	11.573	10
Guanica				
South Porto Rico Sugar Co. of P. R.	106.363	87.916	103.128	81
Central Igualdad, Inc.	21.863	17.350	26.623	33
Central Juanita, Inc.	23.706	23.542	28.467	20
Lafayette				
Association Azuc. Cooperativa	34.568	28.595	29.831	21
Cooperativa Azucarera Los Canos	21.183	17.331	20.732	20
Mercedita	40.385	46.135	38.769	35
Boca Chica	25.508	0	17.618	14
Sucesion de J. Serralles	65.893	46.135	56.387	49
Monserrate				
Jaime y Federico Calaf Collazo	13.805	12.407	15.055	13
Pellejas				
Jorge Lucas P. Valdivieso	2.469	4.045	5.433	6
Plata Sugar Company	16.365	16.150	19.272	17
Rio Llano				
Cia. Azuc. del Camuy, Inc.	0	6.354	8.409	10
Soller Sugar Company	7.799	6.084	7.450	8
Rochelaise				
Mayagues Sugar Co. Inc.	9.928	8.529	11.475	10
Ruñna				
Mario Mercado y Hijos	30.526	27.528	32.040	27
San Francisco				
Arturo Lluberas (Estate of) y Sobrinos	7.257	5.928	7.132	6
Central San Jose, Inc.	18.947	15.807	17.537	17
Central San Vicente, Inc.	43.875	32.667	39.398	35
Santa Barbara				
Sra. Maria del Toro Viuda de Ortiz	2.888	2.951	3.776	3
Central Victoria, Inc.	21.492	17.691	21.780	19
Sub-Total	1.054.337	834.071	995.902	912
Carmen	19.587	14.777	18.453	16
Herminia	2.515	1.979	2.305	1
Playa Grande	8.531	7.615	9.408	8

APPENDIX B

CROP YEAR PRODUCTION OF SUGAR BY PUERTO RICAN MILLS
(Short Tons, Raw Value)

	1937-38	1938-39	1939-40	1940-41	1941-42	1942-43	1943-44	1944-45	1945-46	1946-47	1947-48	Estimated 1948-49
Aguirre	122,158	90,266	101,851	94,427	108,104	108,642	79,070	94,920	85,517	108,704	96,509	118,000
Caribe	7,457	5,886	9,159	8,107	10,273	10,151	8,411	7,999	8,304			
Central Aguirre Sugar Co.	129,615	96,152	111,010	102,534	118,377	118,793	87,481	102,919	93,821	108,704	96,509	118,000
Cambalache	49,405	41,082	49,318	41,269	46,109	42,939	28,925	37,133	41,551	47,133	47,794	50,600
Plazuela	33,174	19,678	23,886	21,047	28,220	26,418	19,891	25,084	24,186	25,549	28,548	33,000
Land Authority of Puerto Rico	82,579	60,758	73,204	62,296	74,329	69,357	48,816	62,217	65,737	72,722	76,382	83,600
Canovanas	40,356	29,401	36,508	34,786	46,248	38,453	24,581	23,719	23,378	34,604		
Fajardo	67,563	56,315	63,432	56,575	68,189	57,232	33,420	45,249	52,112	62,803		
Fajardo Sugar Co. of Puerto Rico	107,913	85,716	99,940	91,361	114,437	95,685	58,001	78,968	75,490	97,413	110,123	112,000
Central Coloso, Inc.	42,302	30,633	45,229	39,517	46,604	42,030	31,632	38,664	44,850	44,901	47,877	52,500
Constancia Ponce Corp. Azucarera Sauri & Subira	9,502	7,089	8,665	7,524	9,397	7,433	5,033	8,166	8,070	8,303	10,878	11,500
Constancia Toa Cia. Azucarera del Toa	27,517	21,120	25,677	23,397	27,745	19,471	14,276	20,241	18,834	23,474	29,197	31,348
Eastern Sugar Associates	119,853	83,143	101,116	93,679	121,920	109,198	70,444	95,059	90,055	132,474	132,558	145,350
El Ejemplo	16,406	11,806	11,859	10,407	11,994	12,432	5,306	12,297	14,167	16,560		17,400
Roig	35,093	25,014	28,659	29,052	33,526	27,417	20,881	28,497	30,634	32,539		39,600
Antonio Roig, Sucesores, S. en C.	51,899	36,820	40,518	39,459	45,520	39,849	26,187	40,794	44,801	49,099	54,849	57,000
Central Eureka, Inc.	19,515	18,899	25,045	24,732	29,714	31,877	19,346	26,670	25,542	30,932	27,719	35,750
Guamani Suc. de Jose Gonzales & Co., S. en C.	14,715	10,432	11,573	10,915	14,027	12,453	10,069	7,195	8,282	12,810	9,153	10,750
Guanica South Porto Rico Sugar Co. of P. R.	106,363	87,916	103,128	81,138	112,716	118,209	82,636	105,254	82,195	05,678	96,935	108,000
Central Igualdad, Inc.	21,863	17,350	28,623	33,222	42,536	39,069	26,189	36,213	40,860	46,524	40,394	53,722
Central Juanita, Inc.	23,706	23,842	28,467	26,394	31,319	24,282	13,980	21,916	23,265	30,060	34,060	30,564
Lafayette Association Azuc. Cooperativa	34,568	28,595	29,831	31,754	34,966	29,248	24,480	27,353	31,255	38,224	34,962	40,000
Cooperativa Azucarera Los Canos	21,183	17,331	20,732	20,089	25,450	20,998	16,906	25,380	20,033	26,855	28,568	31,050
Mercedita	40,385	46,135	38,780	35,390	45,408	41,961	37,508	46,360	47,808	65,257	60,930	65,000
Boca Chica	25,508	0	17,618	14,424	19,213	20,141	12,035	15,555	11,862	0	0	
Sucesion de J. Serralles	65,893	46,135	56,387	49,823	64,621	62,102	49,543	61,915	59,760	65,257	60,939	65,000
Monserrate Jaime y Federico Calaf Collazo	13,805	12,407	15,055	13,450	14,227	16,514	12,625	16,744	17,259	17,139	21,025	24,000
Pellejas Jorge Lucas P. Valdivieso	2,469	4,043	5,433	6,281	5,335	3,619	2,311	3,830	3,678	4,982	6,153	7,130
Plata Sugar Company	16,365	16,150	19,272	17,930	23,426	19,050	13,993	23,602	23,424	29,072	34,888	41,125
Rio Llano Cia. Asuc. del Camuy, Inc.	0	6,354	8,609	10,815	13,696	11,791	9,194	13,187	14,366	16,514	14,500	16,000
Soller Sugar Company	7,799	6,684	7,450	8,803	7,890	6,883	5,602	7,507	7,330	8,978	10,668	12,500
Rochelaise Mayaguez Sugar Co. Inc.	9,928	8,529	11,475	10,169	11,471	11,950	8,819	10,098	10,797	16,829	9,530	10,000
Ruñna Mario Mercado y Hijos	30,526	27,528	32,040	27,956	37,751	32,069	24,932	32,654	26,185	28,229	25,629	34,740
San Francisco Arturo Lluberas (Estate of) y Sobrinos	7,257	5,925	7,132	6,588	8,460	6,278	5,617	6,165	6,274	6,701	6,350	7,000
Central San Jose, Inc.	18,947	15,507	17,537	17,125	18,746	15,983	10,049	15,807	12,200	18,792	19,078	21,200
Central San Vicente, Inc.	43,875	32,667	39,398	35,245	38,753	34,622	22,611	37,528	39,417	46,075	46,597	53,430
Santa Barbara Sra. Maria del Toro Viuda de Ortiz	2,888	2,951	3,776	3,772	3,898	3,534	1,515	3,054	1,903	4,753	3,385	
Central Victoria, Inc.	21,492	17,691	21,780	19,406	24,410	21,679	12,920	18,693	16,836	19,979	20,439	25,053
Sub-Total	1,054,337	834,071	995,902	912,304	1,121,741	1,024,023	713,927	949,583	913,454	1,103,273	1,108,093	1,239,312
Carmen	19,587	14,777	18,453	16,938	21,741	20,185	13,270	19,748				
Herminia	2,515	1,979	2,305	1,991	3,026	1,998	1,831	1,952	2,958	2,786		
Playa Grande	8,531	7,615	9,408	8,310	9,216							
GRAND TOTAL	1,084,970	858,442	1,026,068	939,543	1,155,724	1,046,206	729,028	971,283	916,412	1,106,059	1,108,093	1,239,312

Source: Caribbean Area Office, PMA, USDA, San Juan, Puerto Rico

APPENDIX C

PERCENTAGE OF TOTAL SUGAR CROP PRODUCED BY PUERTO RICAN MILLS
1937-38 to 1948-49

Mills	1937-38	1938-39	1939-40	1940-41	1941-42	1942-43	1943-44	1944-45	1945-46	1946-47	1947-48	Estimated 1948-49
Aguirre												
Caribe												
Central Aguirre Sugar Co.	11.946	11.201	10.819	10.913	10.243	11.355	11.066*	10.506	10.238	9.918	8.709**	9.821
Cambalache												
Plazuela												
Land Authority of Puerto Rico	7.611*	7.074	7.134	6.630	6.431	6.629	6.096	6.406**	7.173	6.635	6.893	6.746
Canovanas												
Fajardo												
Fajardo Sugar Co. of Puerto Rico	9.946	9.985*	9.740	9.724	9.902	9.146	7.956**	8.130	8.238	8.888	9.938	9.037
Central Colcos, Inc.	3.809**	4.267	4.408	4.206	4.032	4.017	4.342	3.981	4.804*	4.307	4.294	4.236
Constancia Ponce												
Corp. Azucarera Sauri & Subirá	876	826	.844	.802	.813	.711	.630**	.841	.881	.757	.982*	.928
Constancia Toa												
Cia. Azucarera del Toa	2.536	2.460	2.502	2.496	2.401	1.861**	1.958	2.084	2.055	2.142	2.548*	2.530
Eastern Sugar Associates	11.047	9.686	9.855	9.971	10.549	10.438	9.068**	9.787	9.827	12.060*	11.963	11.728
El Ejemplo												
Roig												
Antonio Roig, Sucesores, S. en C.	4.784	4.280	3.949	4.200	3.939	3.809	3.589**	4.200	4.899	4.480	4.939*	4.599
Central Eureka, Inc.	1.769**	2.302	2.441	2.632	2.571	3.047*	2.654	2.952	2.787	2.822	2.502	2.965
Guamani												
Suc. de Jose Gonzales & Co., S. en C.	1.356*	1.215	1.128	1.162	1.214	1.190	1.381	.741**	.904	1.150	.826	.867
Guanica												
South Porto Rico Sugar Co. of P. R.	9.804	10.241	10.051	8.636**	9.753	11.289	11.535*	10.837	8.909	8.729	8.748	8.715
Central Igualdad, Inc.	2.015**	2.021	2.505	3.536	3.681	3.734	3.592	3.728	4.459*	4.245	3.645	4.335
Central Juanita, Inc.	2.185	2.742	2.774	2.809	2.710	2.321	1.918**	2.256	2.532	2.742	3.076*	2.466
Lafayette												
Asociacion Azuc. Cooperativa	3.186	3.331	2.907	3.380	3.025	2.790**	3.536	2.816	3.411	3.487*	3.155	3.228
Cooperativa Azucarera Los Canos	1.953**	2.019	2.021	2.138	2.202	2.007	2.319	2.613*	2.284	2.450	2.580	2.565
Mercedita												
Boca Chica												
Sucesion de J. Serralles	6.073	5.374	5.495	5.363	5.591	5.936	6.760*	6.374	6.521	5.954	5.499	5.245**
Monserrate												
Jaime y Federico Calaf Collazo	1.272**	1.445	1.467	1.432	1.231	1.529	1.732	1.724	1.883	1.564	1.807	1.937*
Pellejas												
Jorge Lucas P. Valdivieso	.228**	.471	.530	.660*	.462	.346	.317	.374	.401	.455	.555	.575
Plata Sugar Company	1.508**	1.881	1.778	1.901	2.027	1.821	2.194	2.430	2.556	2.652	3.148	3.318*
Rio Llano												
Cia. Azuc. del Camuy, Inc.		.740**	.820	1.151	1.185*	1.127	1.261	1.358	1.568*	1.507	1.309	1.291
Soller Sugar Company	.719	.779	.726	.614**	.683	.658	.768	.773	.800	.819	.963	1.009*
Rochelaise												
Mayaguez Sugar Co. Inc.	.915	.994	1.118	1.082	.993	1.142	.767**	1.039	1.178*	.988	.860	.807
Rufina												
Mario Mercado y Hijos	2.814	3.207	3.123	2.976	3.266	3.065	3.489*	3.362	2.857	2.575	2.313**	2.803
San Francisco												
Arturo Lluberas (Estate of) y Sobrinos	.668	.690	.695	.701	.732	.600	.770*	.635	.685	.611	.573	.565**
Central San Jose, Inc.	1.746	1.807	1.709	1.823*	1.622	1.528	1.378	1.627	1.331**	1.532	1.722	1.711
Central San Vicente, Inc.	4.044	3.805	3.840	3.751	3.353	3.309	3.109**	3.864	4.301	4.294	4.205	4.311*
Santa Barbara												
Sra. Maria del Toro Viuda de Ortiz	.266	.344	.368	.401	.337	.338	.238**	.314	.218	.434*	.305	
Central Victoria, Inc.	1.981	2.061	2.123*	2.065	2.112	2.071	1.772**	1.924	1.827	1.823	1.845	2.022
Carmen	1.805	1.721**	1.798	1.803	1.881	1.929	1.820	2.033*				
Herminia	.232	.231	.225	.212	.262	.191**	.251	.201	.323*	.254		
Playa Grande	.786**	.887	.917*	.884	.797							

* Largest percentage of crop produced during any year tabulated.
** Smallest percentage of crop produced during any year tabulated.
Source: Computed from figures in Appendix B.

APPENDIX D

RAINFALL IN PUERTO RICO

Normal, 1946, and 1947 Annual Total

Place	Normal Number of years	Normal Inches	1946 Inches	1947 Inches
North				
Arecibo	48	57.9	50.8	45.6
San Juan	50	60.2	42.8	51.0
Fajardo	49	65.0	41.3	52.8
East				
Caguas	49	61.8	45.1	46.8
West				
Mayaguez	49	79.9	72.7	53.8
Average				
Above 5 Stations		65.0	54.3	50.2
South				
Aguirre	48	42.2	36.1	29.1
Ponce	49	35.9	24.0	28.8
Guanica	46	29.9	26.0	24.1
Average				
3 South Puerto Rico Stations		36.1	28.7	27.3

Source: Compiled from Climatological Data—West Indies and Caribbean Service, published monthly by the United States Weather Bureau.

APPENDIX E

PRODUCTION OF SUGAR IN PUERTO RICO— SOUTH COAST AND TOTAL ISLAND, 1930-48

Year	Production of Sugar: Total Island	Production of Sugar: South Coast	Production on So. Coast as % of Total Island	Production on South Coast as % of Total Island for Selected Periods: Period	Percentage
	(1,000 short tons, 96° degree basis)				
1930	788	323	40.99		
1931	992	407	41.03		
1932	834	423	50.72		
1933	1,114	462	41.47		
1934	781	338	43.28		
1935	926	369	39.85	1930-41	39.37
1936	996	418	41.97		
1937	1,077	365	36.68		
1938	852	307	36.03	1935-41	36.81
1939	1,019	357	35.03		
1940	932	315	33.80		
1941	1,148	397	34.58		
1942	1,039	383	36.86	1942-47	34.88
1943	724	288	39.78	1943-47	34.41
1944	964	348	36.10	1944-47	33.43
1945	909	313	34.43	1945-47	32.66
1946	1,088	360	33.09	1946-47	31.88
1947	1,108	341	30.78	1947	30.78
1948	1,274	407	31.95		

Source: 1930-45 from Association of Sugar Producers of Puerto Rico data.
1947 from Exhibit "B"—No. 52, Amended, Issued February 5, 1949, Caribbean Area Office, PMA, San Juan, Puerto Rico.
1948 from Association of Sugar Producers of Puerto Rico estimate, April 16, 1949.

APPENDIX F

PRODUCTION OF BEET SUGAR IN MICHIGAN

Year	Production of Sugar (1,000 short tons refined value)	Average Production in Specified Periods: Period	Average Production (1,000 short tons refined value)
1920	166		
1921	122		
1922	81		
1923	110	1920–25	128
1924	165		
1925	122		
1926	106	1926–31	84
1927	109	1927–31	90
1928	64	1928–31	72
1929	57	1929–31	75
1930	86	1930–31	84
1931	83	1931	83
1932	171		
1933	170		
1934	147		
1935	100		
1936	116	1932–42	147
1937	79		
1938	171		
1939	192		
1940	168		
1941	158		
1942	172		
1943	50		

Source: Crop Reporting Board Work Sheets and *Agricultural Statistics*.

APPENDIX G

PRODUCTION OF SUGAR IN LOUISIANA

Year	Production of Sugar (1,000 short tons raw value)	Average Production in Specified Periods: Period	Average Production (1,000 short tons raw value)
1909	327		
1910	350		
1911	360		
1912	157		
1913	299		
1914	248		
1915	140	1909–1922	261
1916	310		
1917	249		
1918	250		
1919	124		
1920	173		
1921	331		
1922	301	1922–1928	139
1923	165	1923–1928	109
1924	90	1924–1928	97
1925	142	1925–1928	89
1926	48	1926–1928	85
1927	72	1927–1928	104
1928	135	1928	135
1929	204		
1930	188		
1931	160		
1932	228		
1933	200		
1934	239		
1935	341		
1936	386		
1937	605		
1938	491		
1939	434	1929–1948	322
1940	235		
1941	323		
1942	600		
1943	434		
1944	369		
1945	376		
1946	331		
1947	297		
1948	397		

Source:
1909–1939—Sugar Cane for Sugar and Syrup: Acreage, Production, and Disposition, (1909–1939) By States. U.S.D.A., Agricultural Marketing Service, (Feb. 1941).
1940–1947—Agricultural Statistics, U.S.D.A.
1948—Final Manufacturing Reports of Louisiana Sugar Mills, Louisiana State P.M.A. Office, Baton Rouge, La., as published in the *Sugar Bulletin*, March 1, 1949.

APPENDIX H

MAINLAND CANE—SUGAR PRODUCTION 1930-47
(1,000 Short Tons—Raw Value)

Crop Year	Florida		Louisiana	
	Tons	Percentage Change from Preceding Year	Tons	Percentage Change from Preceding Year
1930	27		188	
1931	24		160	
1932	37		228	
1933	41		209	
1934	28	−31.7	239	+14.4
1935	42		341	
1936	51		386	
1937	57		405	
1938	92		491	
1939	70		434	
1940	97	+38.6	235	−45.9
1941	96		323	
1942	80		400	
1943	64		434	
1944	68		369	
1945	99		376	
1946	94		331	
1947	79		297	

Source: Agriculture Statistics, published annually by the United States Department of Agriculture.

APPENDIX I

SUGAR DISTRIBUTION IN CONTINENTAL U. S. AND SHIPMENTS OF PUERTO RICAN REFINED SUGAR TO THE CONTINENTAL U. S. IN YEARS PRIOR TO THE ADOPTION OF SUGAR QUOTA LEGISLATION, COMPARED WITH EXPERIENCE IN YEARS WHEN QUOTAS WERE IN EFFECT
(1,000 short tons, raw value)

Year	Distribution [1]				Puerto Rican Shipments and Entries Refined Sugar to Continental United States [2]	
	Mainland Refiners		All Others	Total		
	1,000 Tons	Percent	1,000 Tons	1,000 Tons	Fiscal Year	1,000 Tons
1929	5,356	76.9	1,608	6,964	1929–30	84
1930	5,032	75.0	1,678	6,710	1930–31	90
1931	4,592	70.0	1,969	6,561	1931–32	103
1932	4,129	66.1	2,119	6,248	1932–33	102
1933	4,020	63.6	2,296	6,316	1933–34	127
1934	4,120	64.9	2,229	6,349	1934–35	105
					calendar year	
1935	4,455	67.2	2,179	6,634	1935	123
1936	4,465	66.6	2,241	6,706	1936	118
1937	4,655	69.8	2,016	6,671	1937	122
1938	4,540	68.3	2,103	6,643	1938	123
1939	4,343	63.2	2,525	6,868	1939	139 [3]
1940	4,548	66.0	2,343	6,891	1940	171 [4]
1941	5,456	67.6	2,613	8,069	1941	121
1948	5,077	69.1	2,266	7,343	1948	122
1949 [5]	4,950	68.3	2,300	7,250	1949	126

[1] Data for 1929 to 1933 from Tariff Commission Report to the President on Sugar, No. 73, Second Series, Table 14, page 165, converted to raw basis using 107 pounds of raw sugar as equivalent to 100 pounds of refined sugar. Data for 1934 to 1941, and for 1948 to 1949, from official reports of the Sugar Branch, U. S. Department of Agriculture, converted to raw value.

[2] Fiscal year data from Annual Book of Statistics of Puerto Rico 1946-47 converted to raw value; these figures appear to include turbinado sugar. Calendar year data from R. 147 and from official reports of the Sugar Branch, United States Department of Agriculture.

[3] Quotas suspended September 11, 1939 to December 31, 1939.

[4] No quota restrictions February 29, 1940 to October 15, 1940.

[5] Estimated on basis of 1949 quotas after reallocation on June 10, 1949, of beet sugar deficit of 200,000 tons; assuming that 100,000 tons of mainland cane sugar will be distributed as direct-consumption raw sugar. The quantity of such sugar so distributed in 1948 was 97,000 tons.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1949.

No. 27.

SECRETARY OF AGRICULTURE, *Petitioner*,

v.

CENTRAL ROIG REFINING COMPANY AND WESTERN SUGAR REFINING COMPANY, *Respondents*; PORTO RICAN AMERICAN SUGAR REFINERY, INC., *Intervenor*; THE AMERICAN SUGAR REFINING COMPANY, ET AL., *Intervenors*; and THE GOVERNMENT OF PUERTO RICO, *Intervenor*.

No. 30.

PORTO RICAN AMERICAN SUGAR REFINERY, INC., *Petitioner*,

v.

CENTRAL ROIG REFINING COMPANY and WESTERN SUGAR REFINING COMPANY, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR PORTO RICAN AMERICAN SUGAR REFINERY, INC.

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BRIEF FOR PORTO RICAN AMERICAN SUGAR REFINERY, INC.

OPINION BELOW.

The opinion of the court below (R. 194-97) is reported at 171 F. 2d 1016. Order 18, promulgated by the Secretary of Agriculture (R. 160-76), is reported at 13 F. R. 310-13.

JURISDICTION.

The judgment of the court below was entered on November 24, 1948 (R. 198). The petition for a writ of certiorari was filed by petitioner on February 21, 1949, and was granted on April 25, 1949 (R. 208). The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1254 and Section 205(e) of the Sugar Act of 1948 (61 Stat. 927, 7 U. S. C. Supp. II, § 1115(e)).

QUESTIONS PRESENTED.

1. Whether the Secretary of Agriculture, in order to achieve a "fair, efficient, and equitable distribution" of the 1948 direct-consumption sugar allowance for Puerto Rico under Section 205(a) of the Sugar Act of 1948, had the authority to apply the factor "ability to market" by taking the best single year's performance by each refiner during the period 1935 through 1947.

2. Whether the Secretary of Agriculture, in order to achieve a "fair, efficient, and equitable distribution" of the 1948 direct-consumption sugar quota for Puerto Rico under Section 205(a) of the Sugar Act of 1948, had the authority to apply the factor "past marketings" by taking the average of the best five years for each refiner during the period 1935 through 1941.

3. Whether the Secretary of Agriculture, in order to achieve a "fair, efficient, and equitable distribution" of the 1948 direct-consumption sugar allowance for Puerto Rico under Section 205(a) of the Sugar Act of 1948, had the authority to determine that the factor of "proportionate shares" was inapplicable and should therefore be given a weighting of zero.

STATEMENT OF THE CASE.

Section 207(b) of the Sugar Act of 1948 (61 Stat. 922-33, 7 U. S. C. Supp. II, §§ 1100-60) provides that "Not more than one hundred and twenty-six thousand and thirty-three short tons, raw value, of the [sugar] quota for Puerto Rico for any calendar year may be filled by direct-consumption sugar"[1] (7 U. S. C. Supp. II, § 1117(b)). Section 205(a) provides further that "Allotments shall be made in such manner and in such amounts as to provide a fair, efficient, and equitable distribution of such quota or proration thereof, by taking into consideration the processings of sugar or liquid sugar from .... sugarcane to which proportionate shares ... pertained; the past marketings or importations of each such person; and the ability of such person to market or import that portion of such quota or proration thereof allotted to him" (7 U. S. C. Supp. II, § 1115(a)). The Secretary of Agriculture determined that the capacity of Puerto Rican refineries to produce and market sugar in the continental United States exceeded the 126,033 statutory limitation and found an allotment to be necessary pursuant to Section 205(a) of the Act, to prevent disorderly marketing and importation of such sugar from Puerto Rico and to afford all interested persons an equitable opportunity to market such sugar in the continental United States.

In accordance with applicable rules of practice and procedure (7 C. F. R. 801.20 *et seq.*, as amended by General Sugar Regulations, Series 3, No. 1, 12 F. R. 8225, 13 F. R. 127, 131) and pursuant to proper notice thereof, a public hearing was held in Washington, D. C., for the stated purpose of receiving evidence to enable the Secretary to make a fair, efficient, and equitable distribution of that portion of the 1948 sugar quota for Puerto Rico to be filled by direct-consumption sugar for marketing in the continental

[1] Direct-consumption sugar is sugar which can be consumed without further refining or processing.

United States. The notice of the hearing contained a proposed allotment formula (R. 145-48).

Following a full and complete hearing (R. 2-144), the Secretary, on January 16, 1948, issued Order 18 (R. 160-76), and the same was filed January 21, 1948 (13 F. R. 310-13). Order 18 contains *inter alia* the basis and purpose of the allotment; the reasons for the order becoming effective when published in the Federal Register instead of complying with the thirty-day effective date requirement of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. §1001 *et seq.*); a summary of evidence adduced at the hearing; the statement of considerations of the Secretary; the findings of the Secretary; the conclusions of the Secretary; and the order providing for specific direct-consumption allotments to Puerto Rican refineries.

In arriving at the final quota figures in Order 18, the Secretary measured "past marketings" by giving each refiner credit for its average annual marketings during its best five years of the period 1935 through 1941 (R. 170, 172); he measured "ability to market" by the highest single year's marketings of each refiner during the period 1935 through 1947 (R. 170-71, 173); and after considering the factor of "proportionate shares" he found it inapplicable to the present situation and gave it a weighting of zero (R. 168-69, 171).

Subsequent to the issuance of Order 18, a Petition for Stay and Reconsideration of Order was filed for and on behalf of the Central Roig Refining Company and Western Sugar Refining Company (R. 176-78). On February 11, 1948, the Petition for Stay and Reconsideration of Order was denied (R. 178-79). Central Roig Refining Company and Western Sugar Refining Company appealed to the United States Court of Appeals for the District of Columbia, praying that a judgment be entered reversing the decision of the Secretary in Order 18 and holding unlawful and setting aside the order.

The Porto Rican American Sugar Refinery, Inc., intervened for the purpose of sustaining the action of the Secretary in issuing Order 18 (R. 183-87).

The American Sugar Refining Company, Godchaux Sugars, Inc., Henderson Sugar Refinery, Inc., Imperial Sugar Company, Inland Sugar Company, the National Sugar Refining Company, Refined Syrups and Sugars, Inc., Revere Sugar Refinery, Savannah Sugar Refining Corporation, and Western Sugar Refinery intervened to support the constitutionality of the Act (R. 187-93).

The Government of Puerto Rico intervened for the purpose of supporting the contention of the appellant that the Act was unconstitutional.

The Court of Appeals for the District of Columbia rendered a decision, 171 F. 2d 1016 (R. 194-97), on November 24, 1948, holding that the Secretary did not comply with the Act, and reversed and remanded the case to the Secretary. The constitutionality of the Act was not decided.

The court's decision can be divided conveniently into three parts, one for each factor considered by the Secretary.

First, in Order 18 the Secretary found that marketing conditions during the war years were so abnormal that he gave each refiner credit for its highest single year's marketings in the continental United States during the period 1935 through 1947. This gave each refiner the benefit of maximum ability achieved under either normal prewar conditions or abnormal wartime conditions (R. 170-71, 173). The lower court held this measure failed to give effect to "ability to market," and stated:

> "... Performance in the 12 years before 1947 has nothing to do with ability to market in 1948 .... Actual performance may be, as the order says, a better measure of ability to market than plant capacity. But since the ability to be measured is current ability, if performance is to be the measure it must be current performance." (R. 196.)

Second, in consideration of the war years' abnormality, the Secretary in Order 18 measured "past marketings" by each refiner's average performance during its best five years of the period 1935 through 1941 (R. 169-70, 172). The lower court held that in excluding the six years 1942-1947 the order failed to comply with the Act, and stated:

> "... 'Past marketings,' as that term is used in the Act, plainly includes marketings within the last half-dozen years or at least the more recent of them. It is doubtful whether the term includes anything else." (R. 196.)

Third, the Secretary in Order 18 considered the factor of "proportionate shares" but concluded that it was inapplicable and therefore gave it a weighting of zero (R. 168-69, 171). The lower court, after citing the Secretary's reasons for his conclusion, held:

> "... No doubt facts of this sort may be considered in determining how much weight should be given to processings of proportionate-shares sugar. In our opinion they cannot justify refusal to give the standard any weight at all." (R. 197.)

Within the statutory time limit both the Secretary of Agriculture and petitioner filed petitions for certiorari. A third petition, based solely on the constitutional issue, was filed by the Government of Puerto Rico. Orders allowing certiorari for all three were filed by this Court on April 25, 1949 (R. 208).

SPECIFICATIONS OF ERROR.

1. The court erred in holding that the Secretary of Agriculture, in issuing Order 18, failed to give effect to "ability to market."

2. The court erred in holding that the Secretary of Agriculture, in issuing Order 18, failed to give effect to "past marketings."

3. The court erred in holding that the Secretary of Agriculture, in issuing Order 18, could not give a weighting of zero to "proportionate shares."

4. The court erred in reversing and remanding Order 18.

SUMMARY OF ARGUMENT.

Section 205(a) of the Sugar Act of 1948 authorizes the Secretary of Agriculture, in order to prevent disorderly marketing or to afford all interested persons an equitable opportunity to market sugar, to allot the direct-consumption portion of the Puerto Rican sugar quota among the refiners of sugar in that area. In making such an allotment, the Secretary is directed to reach a "fair, efficient and equitable distribution" by considering three guides: "ability to market," "past marketings," and "proportionate shares." Clearly the Secretary's actions are controlled by the "fair, efficient and equitable" standard. The intent of Congress was to vest in the Secretary as administrator of the Act the discretion to determine a distribution which is fair, efficient, and equitable by considering the three guides, which are not specifically defined in the Act. There is no requirement that the Secretary reach this result through the use of a mathematical formula.

Nevertheless, in allotting the 1948 direct-consumption sugar quota for Puerto Rico, the Secretary issued his order only after a full hearing on the matter by considering "ability to market" and "past marketings" and weighting each fifty percent. "Proportionate shares" was also considered, but weighted zero because the Secretary determined it to be inapplicable. The Court of Appeals for the District of Columbia reversed the order on the ground that the Secretary had misinterpreted the statutory language and had therefore exceeded his authority. The court did not challenge the fairness of the Secretary's order. It assumed, without referring to the record on which the order was based, that the guides must be given rigid defini-

tions as a matter of law, regardless of whether the result reached is equitable or inequitable.

Petitioner contends that under the Sugar Act the Secretary has the discretion to determine the scope of the statutory guides, provided that his determinations are reasonable in the light of existing circumstances. The reasonableness of his decisions is the sole issue in this case. The Secretary's approach was doubtless not the only reasonable approach which was available to him. The suggestions of the lower court, for example, may not have been unreasonable. But if, with all relevant facts taken into consideration, the Secretary applied the statute reasonably, his order was valid.

The Secretary used as a measure of "ability to market" the highest single year's marketings in the continental United States by each refiner during the period 1935 through 1947. Normally, only the most recent years would have been used. During the war, however, as the hearing record reveals, the Puerto Rican sugar economy was violently disrupted by supply, transportation, shipping, and storage problems and by government restrictions. Puerto Rican refiners were unequally affected by these dislocations, and the use of the war years alone would have been unfair and unrealistic in the case of some refiners, particularly petitioner. For this reason the Secretary concluded that it was reasonable to extend the measuring period to the normal prewar years; but in order to insure fairness to all, he gave full credit for their highest year's marketings to those refiners which reached their peak during the war. Furthermore, in order to establish that the measure of "ability to market" was in fact a reasonable measure of current ability, the present plant capacity of each refiner was used as a check. In each case the tonnage of sugar which could currently be processed substantially exceeded marketings during the year chosen as a measure. In the light of surrounding circumstances the measure used was clearly reasonable.

To measure "past marketings" the Secretary gave each refiner credit for the average of its highest five years' marketings in the continental United States during the period 1935 through 1941. Here again the disruptions of the war were a primary consideration. The Secretary concluded that a proper and orderly historical picture of each refiner's marketings could reasonably be drawn from the orderly prewar years rather than from the chaotic war years, and he therefore excluded the latter. His original proposal called for an average of marketings by each refiner during the seven prewar years. The hearing revealed that this might be unfair to newcomers to the field who did not market during the early years of that period, so, in the interests of equity, the Secretary modified his measurement, using instead each refiner's average marketings during its best five years from 1935 through 1941. His measurement of "past marketings" was thus eminently fair and reasonable.

The Secretary also considered "proportionate shares," a term derived from another title of the Sugar Act relating to a wholly different situation. "Proportionate shares" was weighted zero because the Secretary determined that this guide could not appropriately be applied. At the hearing which preceded the order not one witness suggested a method by which "proportionate shares" could be applied, nor was there any complaint that a weighting of zero for this factor would result in unfairness or hardship to any refiner. The lower court, in holding that the Secretary must give the factor some weighting greater than zero, drew a distinction between the zero weighting and all other weightings, which is highly unrealistic. It is submitted that if the Secretary has the discretion to determine according to surrounding circumstances the weighting to be given a standard, this discretion extends to the use of a zero weighting. The Secretary's determination was fair and reasonable.

Since each decision made by the Secretary was fully supported by the evidence adduced at the hearing, and since

the interpretation which he gave to each of the three standards and the manner in which he applied them were in no sense arbitrary or capricious, his determination should not have been reversed. The interpretations advanced by the lower court provide evidence that other approaches to the problem—if they had sufficient factual support—might be as reasonable as that taken by the Secretary. But the question to be decided in this case is whether the Secretary's decisions were reasonable within the scope of his statutory authority. Such a question cannot be decided in a vacuum with the aid only of the language of the Sugar Act. It must be decided with reference to the facts which the Secretary considered and which formed the basis of his conclusions.

ARGUMENT.

A. The Primary Standard Which the Secretary of Agriculture Must Follow in Allotting a Quota is That It be "Fair, Efficient, and Equitable."

The Sugar Act of 1948 requires that if the Secretary of Agriculture finds it necessary, he shall make allotments of any quota among the marketers and importers of sugar under that quota. This determination clearly requires the exercise of considerable judgment and discretion on the part of a skilled administrator, including the careful appraisal of all surrounding circumstances which may be relevant to the purposes of the Act. When a statute authorizes an allotment involving varied and conflicting interests, it is sound legislative policy to entrust the task of administration to an expert agency and to grant that agency broad discretion. Cf. *Railroad Commission of Texas* v. *Rowan & Nichols Oil Company*, 310 U. S. 573, 580-81 (1940).

Accordingly, Congress used broad language in conferring power under Section 205(a) of the Sugar Act. The Secretary is authorized to set the allotment "in such

amounts as to provide a fair, efficient, and equitable distribution of such quota or proration thereof." The use of the words "fair, efficient, and equitable" evidences the scope of the discretion conferred upon the administrator. In *Securities & Exchange Commission* v. *Chenery Corporation*, 332 U. S. 194 (1947), this Court considered similar language in the Public Utility Holding Company Act of 1935,[2] and concluded:

> " . . . The 'fair and equitable' rule of § 11(e) and the standard of what is 'detrimental to the public interest or the interest of investors or consumers' under § 7(d)(6) and § 7(e) were inserted by the framers of the Act in order that the Commission might have broad powers to protect the various interests at stake. 318 U. S. at 90-91. The application of those criteria, whether in the form of a particular order or a general regulation, necessarily requires the use of informed discretion by the Commission. The very breadth of the statutory language precludes a reversal of the Commission's judgment save where it has plainly abused its discretion in these matters. See *United States* v. *Lowden*, 308 U. S. 225; *I. C. C.* v. *Railway Labor Assn.*, 315 U. S. 373." (332 U. S. at 208.)

That Congress was aware of the significance of the language which it used seems clear from a statement contained in a report by the House Committee on Agriculture[3] when the Sugar Act of 1948 was being considered by Congress. While the statement refers specifically to Section 302(b) of the Sugar Act, which deals with the establishment of "proportionate shares," it indicates that Congress recognized that broad discretion on the part of the Secretary and "fair and equitable" determinations go hand in hand:

> " . . . It is the judgment of the committee that *considerable discretion should be left to the Secretary* to deal with the varied and changing conditions in the various producing areas, *in order to establish fair and*

[2] 49 Stat. 803, 15 U. S. C. § 79 *et seq*

[3] H. Rep. No. 796, 80th Cong., 1st Sess., p. 8.

> *equitable* proportionate shares for farms in such areas." (Emphasis supplied.)

During hearings Mr. Pace, Chairman of the Committee, discussed that section[4] in the following language:

> ". . . Of course, most quota laws do set up certain definite standards to guide the Secretary but it seems here that while those things are elements that he should consider, *it is largely a matter of discretion.*" (Emphasis supplied.)

It must be borne in mind that the "fair, efficient, and equitable" standard is that which primarily controls the Secretary's actions under Section 205(a). The application of a rigid formula which took no account of inequities would thwart the Congressional intent. If the decision of the lower court is upheld, the wide discretion which Congress sought to confer will give way to unduly narrow, judicially imposed restrictions.

In order to assist the Secretary in reaching a fair, efficient, and equitable determination, Congress set forth three subordinate standards: "past marketings," "ability to market," and "proportionate shares." It authorized the Secretary to reach a "fair, efficient, and equitable" result "by taking into consideration" these three factors. Congress did not require that they be applied as a rigid formula. It merely required that they be considered. There is no statutory requirement that the Secretary give a definite weighting to each. He could consider carefully each of the three factors. Then, with these factors in mind, but without the use of an actual formula, he could reach a fair, efficient, and equitable determination. Such procedure would seem to be in accord with the language of the Act and with the intent of Congress. Certainly the Secretary would have reached his decision "by taking into consideration" the factors. As this Court said of minimum milk

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[4] Hearings before the House Committee on Agriculture, 80th Cong., 1st Sess., p. 23.

prices which the Secretary of Agriculture is authorized to fix under Section 8c(18) of the Agricultural Marketing Agreement Act,[5] such administrative decision "cannot be determined by mathematical formula, but the standards give ample indication of the various factors to be considered by the Secretary." *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 577 (1939). This language applies equally to the Secretary's determinations under Section 205(a) of the Sugar Act.

A somewhat similar situation was considered in *Opp Cotton Mills, Inc.* v. *Administrator of the Wage and Hour Division of the Department of Labor*, 312 U. S. 126 (1941). Section 5 of the Fair Labor Standards Act of 1938[6] required that the Wage and Hour Administrator appoint certain industry committees, and that in so doing "the Administrator shall give due regard to the geographical regions in which the industry is carried on." To the contention that this language required the application of a mathematical formula, this Court replied:

> " . . . But the requirement of the statute that the Administrator give 'due regard' to geographical considerations is not a requirement for a mathematical geographical apportionment of the committee. It calls for the exercise of discretion by the Administrator in selecting, *with the purposes of the Act in mind*, a committee on which the geographically distributed interests of the Industry shall be fairly represented." (312 U. S. at 150-51. Emphasis supplied.)

Nevertheless, in administering Section 205(a) of the Sugar Act of 1948 the Secretary has made it a practice to determine on the basis of evidence taken at open hearings, first, a reasonable measure of each factor, and second, a specific weighting for each such factor. Following this procedure it is essential that the Secretary have the power to decide, within reasonable limits, the method of measur-

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[5] 50 STAT. 246, 7 U. S. C. § 601 *et seq.*

[6] 52 STAT. 1060, 29 U. S. C. § 201 *et seq.*

ing each factor and the weighting which it should be given, so that the net result will meet the primary statutory requirement of being fair, efficient, and equitable. If he were limited to one definite measure or to one exact weighting for each factor, his discretion would be greatly restricted and the requirement of fairness and efficiency would become meaningless. The Secretary would have only the power to find the facts and apply the formula; the result, fair or unfair, efficient or inefficient, equitable or inequitable, would be the allotment at which he must arrive.

Yet the decision of the Court of Appeals would tend toward this result. Not only did the court hold that the Secretary had failed to take into account any of the three factors as required by the statute, but it offered its own definition of two of the factors. It did not qualify its definitions; it made no allowances for unusual circumstances which might render them unfair or unrealistic. Indeed, it even implied that the Secretary erred by taking certain equities into consideration (see *infra* at page 22). Certainly there is no warrant for the contention that each factor is, as a matter of law, susceptible of only one definition. Had Congress so believed, it would have written such definitions into the Act.

If the decision of the lower court is not reversed, the Secretary's discretion will be circumscribed by limitations which Congress did not see fit to impose, and the standard of "fair, efficient, and equitable distribution" will be virtually stricken from the Act.

B. The Secretary Was Reasonable in Determining "Ability To Market" as He Did.

Section 205(a) of the Sugar Act of 1948 requires the Secretary to reach a "fair, efficient, and equitable" allotment by taking into consideration, among other factors, "ability . . . to market or import . . . " In issuing Order 18 on the basis of a hearing record replete with testimony to support the decision, the Secretary used as a measure

of "ability . . . to market" the best single year's performance by each refiner during the period 1935 through 1947 (R. 173). The Court of Appeals, without referring to the facts in the record, held that "though the order purports to give effect to 'ability to market' we think it fails to do so" (R. 196).

Whenever an administrator is vested, under statute, with the power to make determinations involving the exercise of his discretion, the underlying theory is that, faced with many choices, he is free to select any which is reasonable. Ideally, of course, the administrator, guided by his experience and expert knowledge, should make the best possible choice. But what constitutes the best possible choice is usually, in actual practice, a matter of opinion, incapable of exact determination. It is therefore basic that the administrator's choice will not be set aside if, taking into consideration all the facts before him, it is reasonable. The fact that other persons, even judges, might find another choice as satisfactory, should not invalidate the administrative determination, provided that there is evidence to support it. See *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303-04 (1937); *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, 286-87 (1934); *Manufacturers Railway Co.* v. *United States*, 246 U. S. 457, 481 (1918); *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361 (1915).

Administrative finality is not applicable only to agency findings of "fact" in the narrow, literal sense; see *Securities & Exchange Commission* v. *Central-Illinois Securities Corp.*, 69 Sup. Ct. 1377, 1393 (1949). For example, in *Gray* v. *Powell*, 314 U. S. 402 (1941), this Court sustained an administrative determination that a particular railroad company was not a "producer" of coal under Section 4 of the Bituminous Coal Act of 1937.[7] In *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111 (1944), the Board's decision that newsboys were "em-

[7] 50 Stat. 72, 15 U. S. C. § 828 *et seq.*

ployees" as used in Section 2(3) of the Wagner Act[8] was upheld, this Court stating:[9]

> " . . . But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. Like the Commissioner's determination under the Longshoremen's and Harbor Workers' Act,[10] that a man is not a 'member of a crew' (*South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251) or that he was injured 'in the course of employment' (*Parker* v. *Motor Boat Sales*, 314 U. S. 244) and the Federal Communication Commission's determination[11] that one company is under the 'control' of another (*Rochester Telephone Corp.* v. *United States*, 307 U. S. 125), the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law." (322 U. S. at 131.)

This language was paraphrased by the Court in *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U. S. 143, 151 (1946), which upheld an administrative rejection of a claim under the Alaskan Unemployment Compensation Law[12] on the ground that the unemployment was "due to a labor dispute which is in active progress." The Court added:

> " . . . To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had this question arisen in the first instance in judicial proceedings." (329 U. S. at 153.)

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[8] 49 STAT. 450, 29 U. S. C. § 152 *et seq.*

[9] The Court's footnotes have been retained but renumbered.

[10] 44 STAT. 1424, 33 U. S. C. § 901 *et seq.*

[11] Under § 2(b) of the Communications Act of 1934, 48 STAT. 1064, 1065, 47 U. S. C. § 152(b).

[12] EXTRAORDINARY SESSION LAWS OF ALASKA, 1937, Ch. 4, as amended by Chs. 1 and 51, SESSION LAWS OF ALASKA, 1939.

See also *Cardillo* v. *Liberty Mutual Insurance Company*, 330 U. S. 469 (1947).

This elementary principle is important in view of the approach taken by the lower court. That court held that the Secretary failed to interpret correctly the language of the Sugar Act of 1948; and it then further stated that, under the Act, the Secretary must necessarily adopt certain alternatives (R. 196). Thus the court, without reference to the facts in the record, held that the Secretary failed to give effect to "ability to market" as set forth in the Sugar Act. This holding was reached through the argument that in administering the Sugar Act "ability to market" can be determined only by one of two measurements. The court accepted, *arguendo*, the contention that "actual [past] performance may be . . . a better measure of ability than plant capacity," but it added that if the former is utilized it must consist merely of performance during the single year preceding the allocation. However, the court's argument did not change the issue before both that court and this one. Whether the measures suggested by the court were reasonable, or whether they were as wise as the measure used by the Secretary, is not in question. The sole issue is still whether the Secretary's choice was reasonable. And a determination of that issue must rest upon the facts which the Secretary had before him in making his decision, and which the Court of Appeals ignored.

Merely for the sake of argument it can be assumed that the measure should relate to "current" ability, since it is used in making current allocations. Current ability, as the lower court pointed out, can be determined either by present plant capacity or on the basis of past performance. The former measure was rejected by the Secretary as less satisfactory than the latter (R. 5, 27, 170). This rejection was certainly not arbitrary, since plant capacity measures potential ability to produce provided that a number of other factors are present, and since ability to produce is related only indirectly to ability to market in the con-

tinental United States. This measure is not so ideal that it was unreasonable for the Secretary to reject it. At the hearing spokesmen for Central Roig and Western accepted this rejection (R. 47-48, 120), and the lower court virtually conceded that the Secretary's action in this respect was not erroneous.

The Secretary therefore decided to reach a fair, efficient, and equitable allotment by estimating current ability to market on the basis of past performance. Past performance may be useful as such a measure because it provides a reasonable basis for predicting ability in the current year. If current ability is to be measured, the past performance must, of course, have some relevance to current conditions, and in the selection of a measuring period or periods many factors come into play which have a bearing upon that relevance. In wholly normal periods the most important of these factors would undoubtedly be proximity in time: that is, a period closely preceding the current period would recommend itself as the most reasonable measure, since it would bear the closest possible relation to the current period. Under such circumstances it might even be unreasonable to reject such a recent period in favor of a period more distant in time. The lower court, in holding the Secretary in error for his choice of a measure of "ability to market," assumed, in fact, that the time relationship so far outweighed all other factors that only the immediately preceding year could be used as a measure.

This assumption, however, is justified only when the period being used as a measure is wholly normal and can therefore provide a satisfactory measure to begin with. Under any circumstances other than normal—in which case the past period chosen is not an exact measure of the present—the significance of the proximity in time is reduced, and other factors may loom far more important. When external events and circumstances render the period under consideration abnormal, the period has from the beginning little value as a measure, and its value cannot possibly be

enhanced by its closeness in time. This is mere common sense. Thus if the ability of a particular refiner to market were demonstrated by consistent performances over a period of years, a sudden, temporary interruption of that performance during a given year or years by freak weather, disease, unforeseen shipping difficulties, the disruptions occasioned by war, or some other obstacle would not indicate that the refiner's ability to market had actually changed. In all probability, its ability during a subsequent year would resume the pattern of the normal, rather than the abnormal, period. Yet the lower court made no qualification whatever to indicate its recognition of this situation. It failed to realize that the Secretary must deal, not with absolutes, but with factors which differ in relative importance from year to year, according to the existing circumstances. It failed to realize that the circumstances experienced by Puerto Rican refiners during the war years were extremely abnormal, and that performance during those years, particularly in the case of petitioner, bore no necessary relationship to ability to market in 1948. Those circumstances were set forth in detail at the hearing which preceded Order 18 and served as a basis of Order 18.

"Ability to market" includes the ability to make, ship, and sell one's product in the continental United States. The record upon which the Secretary based his decision revealed two salient facts: first, that during the recent war years production, shipping, and marketing of Puerto Rican sugar were seriously disrupted; and second, that these disruptions affected various sugar producers unequally.

The wartime dislocations were set forth clearly at the hearing and were considered by the Secretary (R. 28-29, 164-66). On August 14, 1941, price control over sugar became effective (R. 110). On April 13, 1942, the President proclaimed an emergency with respect to sugar. Title II of the Sugar Act of 1937[13] was suspended, and no individ-

[13] 50 STAT. 903.

ual marketing allotments of direct-consumption sugar were made under this Title until the suspension was lifted on November 28, 1947 (R. 9, 29, 109). During the war years there were problems brought about by Navy controls and submarine warfare (R. 14, 68). Caribbean shipping had to be convoyed, and shipping space was limited (R. 70-72). Imports and exports of sugar into and from the United States were controlled by the Government (R. 109). From 1944 through 1946 the Commodity Credit Corporation purchased all available Puerto Rican raw sugar in excess of local needs. The corporation then determined the quantity which could be refined for marketing in the United States, and released this quantity to the raw mills for sale to refiners (R. 32-34, 67). Since the decisions of Commodity Credit Corporation as to the disposition of this sugar were prompted by considerations of wartime requirements (R. 14), the normal channels of supply for refiners were disrupted. In 1947 a different procedure was followed, with Commodity Credit Corporation utilizing a purchase contract to allot marketing quotas directly to the refiners (R. 12-13) on the basis of each refiner's 1946 marketings in the United States (R. 119). Unlike allotments under the Sugar Act of 1937 or the Sugar Act of 1948, the 1947 contract was not subject to the requirement that the results be "fair, efficient, and equitable" (R. 14).

That the wartime dislocations affected different refiners in varying degrees is amply demonstrated by the record of the hearing (R. 23-24, 170). Thus some refiners experienced no difficulties (R. 50-52, 59, 61). In fact, some were benefited by the war years (R. 45). Others, particularly petitioner, were faced with serious problems. Petitioner had had a long and consistent record of marketing in the continental United States (R. 36). Indeed, it had introduced the sugar refining industry into Puerto Rico; the quota for direct-consumption sugar from Puerto Rico which is contained in the present Sugar Act is based almost entirely upon petitioner's marketings (R. 69-70, 155). However, because of its location and operational methods, peti-

tioner was faced with substantial difficulties during the war years (R. 74-75, 78-80, 97). Unlike some of its competitors, petitioner depends for part of its raw sugar supply upon nonaffiliated mills (R. 37, 85-88), and with gasoline and tires rationed and truck transportation strictly regulated, it was often unable to secure transportation from such mills (R. 63, 73). Furthermore, petitioner is located so far from the principal wartime seaport that it was impracticable to transport its sugar there (R. 68, 74). The movement of the sugar to a smaller but closer port was also fraught with problems (R. 65). Wartime black-outs caused difficulties (R. 64-65). There was a shortage of bags (R. 64). At least one shipment of petitioner's sugar was presumably lost at sea (R. 81). Forced by the lack of shipping facilities to store its sugar in Puerto Rico, petitioner was unable, despite all its efforts, to obtain the necessary storage space, with the result that its production was slowed down and at times even halted (R. 66-67, 77, 104-05).

In 1947, when the refiners began to emerge from the effects of the war (R. 68), petitioner contracted to buy approximately 85,000 tons of raw sugar for refining and shipping to the United States. It was prevented from doing so by Commodity Credit Corporation, which limited its shipments to 60,820 tons (R. 69). The record is devoid of any indication that similar cut-backs were forced on other refiners.

In short, it is clear that the use of such years, however recent they might be, was by no means the only reasonable method of determining the current ability of all Puerto Rican refiners to market. In the case of petitioner the distortions of the normal pattern were so great that those years would not and could not lead to "fair, efficient, and equitable" results.[14]

[14] At the hearing the President of Western Sugar Refining Company testified that marketings for 1947 alone should be used as the measure of every refiner's ability. His basis for this proposal was that in allotting the direct-consumption sugar for the year 1939 the Secretary had given some weight to 1938 marketings. Counsel

With all the above facts before him, the Secretary made his finding in these words:

> ". . . Under normal circumstances the selection of a recent year to measure ability would seem reasonable. The past six years, however, have been abnormal years for the sugar industry in Puerto Rico and elsewhere. Therefore, the selection of a recent year to measure ability for all Puerto Rican refiners would not be fair to some, and would not properly measure their ability." (R. 170.)

Nevertheless, the Secretary did not reject the war years entirely, since he decided that it would be "fair to select a recent year from any refiner who despite wartime difficulties, has been able to demonstrate greater ability than was demonstrated during pre-war years" (R. 170). For two of the refiners this peak year was 1947. It is difficult to find cogent arguments with which to challenge the reasonableness and fairness of the procedure followed. Indeed, the lower court did not deny that the measure used by the Secretary was chosen in an effort to reach a fair and equitable result. However, the court was critical:

> "The Secretary's argument undertakes to equate each refiner's ability to market with the right to market that the Secretary thinks the refiner ought, as a matter of fairness, to have." (R. 196.)

In a sense, this language distorts the Secretary's purpose since it implies that he considered not "ability to market" but an artificial measure which he invented. In fact, as the record discloses, the Secretary sought only to use a reasonable measure which would contribute to a "fair, efficient, and equitable" result, in accordance with the mandate of the Sugar Act.

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for petitioner pointed out that 1947 was Western's best year but an extremely poor one for intervenor, and asked whether "it would be fair to take your best year and take your competitor's worst year?" The witness replied, "Not at all, no. If there were not (sic) ruling and no precedent that the previous year be taken, of course not" (R. 124).

The lower court's chief objection to the measure used by the Secretary would seem to be that the measuring year for certain refiners, particularly petitioner, was separated from 1948 by a number of years. However, distance in time is not in itself an evil; it is objectionable only when events during the intervening years have been such that the measuring year no longer bears any reasonable relation to the year for which the allotment is set. Such a measure might be unreasonable, for example, if the intervening years had seen a steady decline in the marketing ability of a particular refiner. The court flatly ignored the fact that the procedure employed by the Secretary in issuing Order 18 effectively obviated this objection. While the Secretary rejected plant capacity as the primary measurement of "ability to market," he nevertheless checked the current capacity of each refiner in order to insure that its ability in the year chosen as a measure bore a fair relationship to its present ability (R. 16-17, 149). This check disclosed that in each case present capacity substantially exceeded marketings during the measuring year (R. 147, 149, 164). It revealed also that despite the fluctuations of marketings during the war years, current capacity did not differ significantly from capacity in the prewar year of 1939 (R. 27-29). In the case of petitioner, Juan E. Mayoral, engineer and general superintendent of manufacturing operations, testified that its actual plant capacity exceeded that shown by the figure for 1947, a year in which restrictions forced a production slow-down (R. 105). He stated that the refining capacity of petitioner had increased "conservatively at least 10 per cent over the 1939 capacity" (R. 103). Mr. Gustavo Lobo, Jr., President of Olivarria & Company, Inc., of New York, which markets petitioner's sugar in the United States, testified that "During the past five years, I could have marketed any amount that they shipped up, and I would say next year 150 to 200 thousand tons would present no difficulty" (R. 62). On the basis of this evidence it was not arbitrary for the Secretary to find that the measure used for each refiner bore a reasonable relationship to ability in 1948.

In other words, the Secretary's measure was chosen because, with evidence of present plant capacity as a check, it was concluded that ability to market once established by actual performance would normally continue despite the fact that, for a period of years, external obstacles or restraints prevented full utilization of that ability. On the other hand, to argue that a temporary and unavoidable failure to utilize one's ability must inevitably result in diminished ability so as to render invalid as a measure the earlier normal period, seems unreasonable and unrealistic in the extreme. One might with similar logic argue that because the atom bomb was not used in warfare in 1946, 1947, or 1948, its earlier performance in 1945 has ceased to have any relationship to its potentialities in 1949.

As has been shown, the Secretary's measure did not discriminate arbitrarily or unfairly in favor of Porto Rican American as against recent arrivals in the field. Nor did the lower court maintain that there was any such discrimination. Since the best single year's performance by each refiner was recognized, each refiner whose marketings reached a peak during a war year—even though this may have been made possible by temporary abnormal conditions—received the full benefit of that figure.

Thus the Secretary's measure was eminently fair and reasonable. No baseless assumptions were involved and no outrageous results achieved. The suggestions of the lower court, had they been supported by any factual foundation, might have been as wise as the measure used by the Secretary, but his measure was clearly not arbitrary or capricious.

C. The Secretary Was Reasonable in Determining "Past Marketings" as He Did.

The Sugar Act of 1948 requires the Secretary to reach a "fair, efficient, and equitable" result by taking into consideration also "past marketings." Acting on the basis of the hearing, the record of which provided ample support

for his decision, the Secretary issued Order 18, in which he measured this factor by the average of the highest five years' marketings in the continental United States by each refiner during the period from 1935 through 1941. The Court of Appeals held that "In excluding the six years 1942-47 the order fails to comply with the Act" (R. 196). In reaching this conclusion the court stated that "past marketings" includes marketings within the last half-dozen years or at least the more recent of them, and that it is "doubtful" whether it includes anything else. As was true of its statement regarding "ability to market," the court made no qualification; its decision would seriously impair the Secretary's discretion.

Again, the sole issue presented is the reasonableness of the measure used by the Secretary. Whether or not it represented the wisest possible choice which he could have made is not at issue here. If he acted on grounds which made his choice reasonable, he did not commit an error of law, and his decision should not have been reversed.

Certainly the Secretary considered and applied "past marketings" as a measure, but the lower court assumed that the phrase as used in the Sugar Act has a special meaning. Yet it is not defined in the Sugar Act in the language employed by the lower court or in any other language. Unlike the lower court, Congress was willing to permit the Secretary to determine the scope of the term; had it desired to limit the Secretary's consideration to certain years, it would have done so specifically.

The language of the court implies that *Gay Union Corporation* v. *Wallace*, 71 App. D. C. 382, 112 F. 2d 192 (1940), *cert. denied*, 310 U. S. 647 (1940), was regarded as at least indirect authority for the court's position on this point. In the *Gay Union* case, the manner in which the Secretary measured "past marketings" under the Sugar Act of 1937 was attacked. But the court there held that a measurement which took into consideration only the preceding four years was not an abuse of discretion. It made no attempt to lay

down a rigid definition of "past marketings." On the contrary, it reaffirmed that the Secretary has broad discretion in determining the meaning of the term in question, and that his decision will stand unless the period chosen bears no reasonable relation to the current situation. In holding the Secretary's determination to be reasonable, the court did not suggest—as the lower court in the present case implied—that all other measures would have been unreasonable.

The sole question, therefore, is whether exclusion by the Secretary of the years 1942-1947, and the use instead of average marketings in the continental United States for the best five years for each refiner during 1935-1941, was so arbitrary as to be unreasonable. The Sugar Act does not specify how recent or how remote the "past marketings" should be. But under completely normal conditions the more recent past marketings would seem, as a matter of common sense rather than statutory interpretation, to have greater relevance to a current quota allocation than would earlier performance. And if such recent performance were without reason ignored and consideration given instead to a period so remote in time that it bore no relation to the present, the procedure might be categorized as arbitrary or capricious.

As in the case of "ability to market," the desirability of recent years as a standard exists only if those years provide an accurate measure to begin with. Only in such a case can the closeness in time of the measuring period have any significance. If, however, external conditions were to arise so that recent marketing reflected little more than fortuity or the results of emergency government controls, such years would distort marketing records, and it would not be unreasonable to exclude them.

Such abnormal conditions certainly existed from 1942 through 1947. The record abounds with testimony concerning the disruptions caused by the war, the emergency controls, the supply, transportation, shipping and storing dif-

ficulties, and the unequal impact of these abnormalities upon the various Puerto Rican refiners. All these have been discussed *supra* at pages 19f. Their net effect, as the record clearly discloses, was to create disorderly and even chaotic marketing conditions to such an extent as to render those years a completely unreliable yardstick.

It was therefore reasonable for the Secretary to consider and then to exclude the years 1942-1947 from his final measure of past marketings. The Secretary justified his act as follows:

> "In determining past marketings, it is necessary to select a representative period which is fair and equitable to all refiners in Puerto Rico. The years selected should properly reflect the normal history of the individual company. Ordinarily the most recent period of marketings recommends itself as reasonable. The past six years, however, represent a period of great abnormality for the sugar industry. . . . It is apparent from the record that the past six years are not representative years for past marketings and should not be used." (R. 169-70.)

At this point it is well to recall that allotments are authorized under the Sugar Act to "prevent disorderly marketing" and to "afford all interested persons an equitable opportunity to market sugar" in the continental United States. Surely it was not arbitrary for the Secretary to conclude that the cause of orderly marketing would be disserved by quotas based upon years when tremendous disorder admittedly existed in the marketing of sugar.

Furthermore, as testimony at the hearing revealed (see *supra* at pages 20f), the dislocations of the war were unequal in their impacts upon Puerto Rican refiners. Marketings were not only disorderly but grossly unfair as a measure to certain refiners, particularly petitioner. Remembering again that the Sugar Act authorizes quota allocations "to afford all interested persons an equitable opportunity . . ." and that the final result must be "fair, efficient, and equita-

ble," the Secretary did not act unreasonably in excluding the war years.

In Order 18 the Secretary pointed out that whereas in computing "ability to market" he gave certain refiners credit for peak performances achieved during the war, his final formula for "past marketings" excluded those years entirely (R. 170-71). This was not arbitrary. A maximum marketing figure reached by a refiner during the war years might fairly represent continuing "ability to market." "Past marketings," on the other hand, should be so selected as to give each refiner fair credit for its normal historical record over the years, and the use of the highly abnormal wartime years would provide an extremely distorted basis for such a record. There is no capricious inconsistency between the two measures; the distinction is clear and reasonable. In the words of the Secretary, "Ability to market should be recognized under whatever conditions demonstrated, although the year selected may not for other purposes be regarded as normal or representative" (R. 171). The war years were considered unrepresentative as a measure of "past marketings."

The Secretary's choice of the period 1935 through 1941 rather than the war years was not unfair or unreasonable. Those years were not so remote that they bore no relationship to the terms as used in the Act; in fact, they were the closest possible years, once the Secretary had rejected the period which he thought unrepresentative. Furthermore, in Order 18 the Secretary used as a measure for each refiner the average of the best five years during the chosen period rather than the straight average of all seven years, as originally proposed (R. 5). This change was made (R. 171) as a result of the hearing, which included testimony that in 1935 one refiner was not in existence and that during certain years another refiner marketed only turbinado sugar in small amounts (R. 45). The Secretary's action in changing the formula is further evidence of his desire to achieve results which would be reasonable and fair to all refiners.

It cannot be emphasized too frequently that the Secretary's choice was not necessarily the only reasonable one. If the record offered the necessary substantiation, other choices might have been sufficiently reasonable to comply with the statute. The issue in the instant case is the reasonableness of the Secretary's choice, not its superiority over alternative choices. His measure of "past marketings" was reasonable and should have been sustained by the lower court.

D. The Secretary Was Reasonable in Finding That "Proportionate Shares" Was Inapplicable and in Giving It a Weighting of Zero.

Section 205(a) of the Sugar Act of 1948 requires the Secretary of Agriculture to reach a "fair, efficient, and equitable" allotment by taking into consideration "processings of sugar . . . from . . . sugarcane to which proportionate shares . . . pertained." The Secretary, after fully considering this factor, found it inapplicable and therefore gave it a weighting of zero. The Court of Appeals held that as a matter of law the Secretary must accord to this factor some weighting greater than zero.

The phrase "porportionate shares" is derived from Title III of the Sugar Act, which provides for conditional payments to producers of sugar beets or sugarcane. Each farm is assigned its "proportionate share" of the quota which has been set for the producing area in which the farm is located. In order to qualify for these conditional payments the grower must not market sugar beets or sugarcane in excess of his proportionate share; he must not employ child labor outside his own immediate family; and he must not market or process "an amount . . . of . . . sugarcane grown on the farm and used for the production of sugar . . . to be marketed in, or so as to compete with or otherwise directly affect interstate or foreign commerce, in excess of the proportionate share for the farm . . ." Pay-

ment may be made to producers for the amount of sugar beets or sugarcane which is commonly recoverable from the sugar beets or sugarcane grown on the farm and marketed (or processed by the producer) not in excess of the farm's proportionate share.

Thus the use of "processings of sugar . . . from . . . sugarcane to which proportionate shares . . . pertained" as a guide to the allotment of direct-consumption sugar presents serious difficulties. The phrase seems clearly to refer to the processings of sugar from sugarcane by the respective allottees. But such processed sugar is actually "raw" sugar and must be refined before it becomes direct-consumption sugar. The three largest Puerto Rican refiners (*i.e.*, the parties to the present action) do not process raw sugar from sugarcane but instead obtain the raw sugar from independent sources or from affiliated mills. At the hearing which preceded Order 18, there was no complaint on the part of anybody that failure to utilize "proportionate shares" as a factor would result in discrimination. On the contrary, no refiner suggested a practical method of applying this standard. Mr. J. Adalberto Roig, Vice President of Central Roig Refining Company, offered a formula which made no allowance for this factor, and added only that "if the law so requires it I am willing to accept that the Secretary add to my proposed formula a small weight based on proportionate shares . . ." (R. 49). Similarly, Mr. Alfredo Ramires de Arellano, Jr., President of Western Sugar Refining Company, testified that if necessary this factor could be included, but he offered no suggestion as to how this might be accomplished (R. 123).

In view of the foregoing facts, the Secretary in Order 18 gave the factor a weighting of zero. The Court of Appeals, in holding the Secretary in error, stated that the facts on which he relied "may be considered in determining how much weight should be given to processings of proportionate-shares sugar. In our opinion they cannot justify refusal to give this standard any weight at all" (R. 197).

The court failed, however, to comment further on the facts which the Secretary had before him or to indicate the manner in which this standard could be applied.

It is well recognized that when an administrator considers several factors, the weighting which he gives to each factor lies within his discretion; see *Interstate Commerce Commission* v. *City of Jersey City*, 322 U. S. 503, 522 (1944). The Court of Appeals did not deny this proposition. However, it appeared to draw a highly unrealistic distinction between a weighting of zero and any other weighting. Presumably if the Secretary had found a means of giving the standard in question a weighting of fifty percent, the court would have been satisfied. Furthermore, its language plainly suggests that it would have upheld a weighting of ten percent, five percent, or even one or one-half percent. If the Secretary has the discretion to determine the weighting of a standard in this manner, how can it be said that he exceeds his authority by choosing a weighting of zero? If he has the authority to choose a weighting of fifty percent or of one percent according to the existing circumstances, he would seem clearly to have the authority to choose a weighting of zero percent provided that the facts make this choice reasonable. In the instant case the facts all point to the reasonableness of such a choice. In fact, the hearing record is utterly devoid of any suggestion of a reasonable means of giving greater weight to the factor.

The lower court placed great stress upon the fact that the Sugar Act requires the Secretary to reach a decision "by taking into consideration" the three factors, stated conjunctively rather than disjunctively. The court apparently interpreted this language to mean that the Secretary must reach his decision by giving each factor a weighting greater than zero. This construction is wholly unwarranted. The language of the Act does command the Secretary not to ignore any factor. But it is possible for him to take a factor into careful consideration, to hear the testi-

mony of interested parties, to take account of all surrounding circumstances, and then to conclude that the factor should be given a zero weighting in order that a fair, efficient, and equitable distribution may be achieved. Such procedure is consistent with both the spirit and the letter of the Sugar Act. On the other hand, any interpretation of the language of the Act which would prevent the reasonable action taken by the Secretary in issuing Order 18 is unduly narrow and restrictive.

As the record reveals (R. 168-69), the Secretary did take into consideration "processings of sugar . . . from . . . sugarcane to which proportionate shares . . . pertained," and his action in giving this standard a weighting of zero was reasonable.

CONCLUSION.

For the reasons stated it is respectfully submitted that the decision below should be reversed and the cause remanded with directions to enforce Order 18 of the Secretary of Agriculture.

Respectfully submitted,

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IN THE

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and

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THE SECRETARY OF AGRICULTURE, *Petitioner*,

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THE GOVERNMENT OF PUERTO RICO, CENTRAL ROIG REFINING COMPANY, WESTERN SUGAR REFINING COMPANY, ET AL., *Respondents*.

Reply Brief for the Government of Puerto Rico, Petitioner in No. 32, Respondent in No. 27.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

An extended reply to the briefs presented by the Secretary of Agriculture and by the Coast Refiners seems unnecessary. A few paragraphs will suffice to focus issues, to hedge off the irrelevant, to refer cited holdings to their context, and to impose precision upon the wandering lines of the adverse argument.

I. *Texture of the Argument.*—A few sentences, with scant yet typical examples, are enough to reveal the texture of the adverse arguments.

1. *Question.* The arguments of the Secretary and of the Coast Refiners are not addressed to the question presented by the Government of Puerto Rico. That question is whether or not the accused section is authorized by the Constitution. Ours is, in all its branches, a responsible government of limited powers; and each exercise of power demands its specific warrant. The violation of the due process clause of the Fifth Amendment is only a single facet of our constitutional argument.

2. *Irrelevant Matter.* The briefs, particularly that of the Coast Refiners, contain much irrelevant matter. Thus an excursion is invited into the federal and territorial income taxes as they affect citizens of Puerto Rico. The material for an understanding of that matter is not in the statutes, federal and insular. Puerto Ricans do pay income taxes, both personal and corporate, at rates substantially equivalent to federal rates. The matter is not in issue here. Such numerous excursions into irrelevance speak for themselves.

3. *Begging the Question.* The briefs, especially that of the Coast Refiners, are beset with the vice of begging the question. It does not dispose of the issue to cite *Mulford* v. *Smith*, 307 U. S. 38 and *Nebbia* v. *New York*, 291 U. S. 502 to the effect that the Congress is free "to adopt whatever economic policy may reasonably be deemed to promote public welfare"—when the issue is the reasonableness of the accused section. Nor will it do to cite *U. S.* v. *F. W. Darby Lumber Co.*, 312 U. S. 100, to the effect that "the judicial cannot prescribe to the legislative department . . . limitations upon the exercise of its acknowledged power"—when the very question before the Court is whether the power in question should be acknowledged. See Brief of Coast Refiners, pp. 15, 20, 25; Secretary's Brief, p. 84.

Nor will it do to insist that new passengers must not board a train in which all seats have been sold and thus impede the rights to which the sitting passengers are legally entitled—when the very question at issue is the legal rights of the sitting passengers. (Br., C. Refr., p. 18) The adverse arguments are replete with such question-begging.

4. *Resort to Categories.* The adverse briefs, especially when the going is hard, attempt to avoid the specific issues presented by the instant case by resort to over-general categories. Thus an attempt is made to answer questions without ever stating them, through the device of calling Puerto Rico an "unincorporated territory" or even a "possession" of the United States. For calling Puerto Rico a "possession" there is no excuse in fact or in law. The distinction between "incorporated" and "unincorporated" was invented in *Downes* v. *Bidwell*, 182 U. S. 244, as a salutory legal device to avoid forcing the provisions of our Constitution on a people habituated to the civil law when they had not attained that stage of economic development essential to the assumption of the full obligations of American citizenship. Although dicta have gone astray, it has at the hands of careful judges, been limited to matters of revenue. It was vigorously urged upon, and rejected by the Supreme Court in *People of Puerto Rico* v. *Shell Co. (P. R.), Ltd.*, 302 U. S. 253. There a unanimous court held that as general terms "incorporated" and "unincorporated" were without legal significance; that they had meaning only in the context of the acts being passed in review. In respect to the only two matters which are vital here, Puerto Rico is fully incorporated. For the citizens of Puerto Rico have been completely merged into the people of the United States and Puerto Rico is fully included within the tariff wall of the United States. The law does not decide concrete cases by reference to over-general categories. In like manner the Coast Refiners, throughout their brief, rely upon a general and evasive power of regulation vested in the Congress. Thus, if the Congress has power

to impose upon raw sugar an equitable system of control, it follows that it has power to impose upon refined sugar an inequitable system. In a word, it is argued that the reasonable exercise of power in one area of the economy validates its irresponsible exercise in another area. In like manner the briefs neglect entirely the circumstances of the cases cited and the exact status of the territory involved at the time of decision. We insist the specific issues raised here must be met in terms of the present status of Puerto Rico in our federal union.

5. *Retreat to Rhetoric.* Where the going is hard, the adverse parties tend to retreat to rhetoric. Thus, to escape the issue, national security is invoked. The Congress has decreed that a substantial part of our sugar shall come from off-shore. Section 207(b) in no wise affects the proportion of off-shore to mainland. It merely prescribes the form in which the sugar is to be marketed. For what it is worth, the war argument runs against the accused section; for refined sugar takes less shipping space than raw. Let Puerto Rico be attacked by a foreign power and note how quickly it is resolved that the sovereignty of the United States has been invaded. It is needless to cite other examples of the retreat to rhetoric; they are obvious.

II. *The Instant Case in Focus.*—A few sentences ought to be enough to restore the instant case to focus. It is, of note that in spite of excursions by the adverse parties—

1. It has no concern with foreign commerce. Sections 207(d) and 207(e), imposing limitations upon the amounts of refined sugar which may be brought into our continental market from the Philippines and from Cuba, raise such a question: Section 207(b), applying to Puerto Rico, does not.

2. No issue of the power of the Congress to enact a program of farm relief or by appropriate measures to abate the distress of an agricultural or an extractive industry is here in question.

3. It is a matter of course, that in our modern industrial society a scheme for the control of an industry can neither be formulated or applied with a standard which is precise. We fully recognize the necessity of departures from uniformity.

4. There is here no challenge to the power of the Congress to decree economic policy. The decision to leave the sugar producing industry unregulated, to employ the tariff as a system of industrial control, to set up a system of regulation all complete with allocations and processing taxes, or to seek some other way out of industrial distress belongs to the legislature.

5. There is here no issue of the validity of a quota system for refined sugar. As has been shown in our original brief, such a system lies outside the rationale which thus far has been used to sustain regulatory systems in the agricultural and extractive industries, marked by over-capacity and an unorganized multitude of producers. The point is that in the Act the Congress has set up no quota system for refined.

6. No issue of substantive due process is raised here. No question of policy is presented to this Court. This Court is not called upon to amend or to revise any Act; to decree or to outlaw any scheme of control; to bar from, or to bring into public policy, any value or scheme of values.

7. In a word, all the case is concerned with is a procedural issue. In whatever policy the Congress chooses, in whatever scheme of regulation it sets up, it has no authority from the constitution to weave gross discrimination into the legislative web, or to select a single group as an object of its disfavor, or to arrest the development of an American body politic, to the end of conferring special favors upon a privileged group, and of vesting it with proprietary rights in the market.

III. *The Accused Section and the Tariff.*—As briefs have been exchanged and the instant case has taken its way from the Secretary to this Court, the legal battle line has been shifting. The shift has been caused by the persistent attempt by the Secretary and by the Coast Refiners to discover a firm legal foundation for an irresponsible power in the Congress to deal with Puerto Rico in a way which both admit would be invalid in respect to a state—and the citizens of a state—in the union. It is unnecessary to review the changing front which has attended the progress of the case. Here it is enough to cite the three arguments which currently make up the cult of irresponsibility.

1. The first seeks to evade the question of the validity of the accused section. To that end the Secretary in the court below—now joined by the Coast Refiners—argues that Section 207(b) is an integral and inseparable part of the Act. That contention has been met in our original brief—no repetition here is needed. Central Roig and Western point out that it was no part of the farm relief bill proposed by the administration. (Br. pp. 21 ff) The Coast Refiners insist that the Act contains no severability clause and immediately deny ttheir own contention by pointing out that Section 207(g), segregating the refined from the general sugar provisions, is itself a severance clause. (Br. pp. 29-30) The plain truth is that the general provisions in respect to sugar constitute a farm relief measure of the current model while the provisions of Section 207 are a throwback to the Old Colonial System. The accused section does not belong to the same Act; it does not belong to the same century.

2. The second is to substitute another issue for that which the Government of Puerto Rico has raised. The Secretary has frankly admitted that the accused section serves a private interest; that it was passed by the Congress for the benefit of the mainland refiners. (Br. pp. 69). The Coast Refiners elaborate this theme. They were here first; they

have an excess of capacity; the accused section lawfully vests them with a proprietary right to refine for the continental market all cane sugars grown off-shore save for the small driblets allowed to the off-shore territories. (Br. 17 ff) This theme of proscriptive right, which runs through the entire argument, stems from feudal law and is alien to our whole legal system.

3. The third, and principal devise, to save the accused section by endowing the Congress with irresponsible power, is to put Puerto Rico outside the United States and yet to hold it under the dominion of the Congress. This is accomplished by two acts of faith and a sequence of "therefores." The first act of faith is that Puerto Rico is—or is to be treated "as if" it were—a foreign country. This ignores the Foraker and the Organic Acts as amended, the fact that the body politic legally known as the People of Puerto Rico is a community of American citizens and the fact that Puerto Rico and the continental United States are surrounded by the same tariff wall. The second act of faith is that the accused section is—or at least is to be treated "as if" it were—a tariff for the protection of American industry. This overlooks the fact that Puerto Rican industry is United States industry. The "therefores" may possibly be compelling "therefores," but the questions concerned with the march of argument do not have to be faced until the validity of the two acts of faith is established.

(a) The accused section is not a tariff measure. It does not, and was never intended to, raise revenue. Nor has it anything to do with what goods come into the continental market. Its sole concern is with the stage of production at which legally they may be brought into the continental segment of the national economy.

(b) Refined sugar from an off-shore territory is not an "import" into the United States, but a commodity brought into the economic area of the United States known as the continental market. This difference between political state

and continental market presents a problem which neither the Secretary nor the Coast Refiners even attempt to meet.

(c) The word "import" presents an additional difficulty. It could be used with propriety in respect to products from the Philippines, for its people were never American citizens and it has not been included within our customs union. But to say the Philippines, therefore Puerto Rico, is to ignore the very different status of each in the federal union called the United States of America. These differences we have shown to be not only substantial but also fundamental; and there is not one word in either brief to indicate that these differences do not make a distinction. Even if Puerto Rico was for the purpose made alien soil, the argument could not be made to run. For Hawaii in every respect has long since been incorporated into the United States. And to make the argument valid, the refined sugar that comes into the continental market from a domestic source would have to be called an import. There is no escape from the fact that the refined sugar from off-shore enters a specified area of the national economy, not the political state known as the United States.

(d) Even if, to make the tariff argument go, Puerto Rico is to be called a foreign country, it will not make it so. The Congress has the power to regulate commerce with a foreign country as it pleases; but the foreign country has the power to strike back. The validity of the accused section—if it should be declared valid—would confer upon Puerto Rico no power to exclude, or even to tax, goods coming to the island from the mainland. Puerto Rico will remain domestic territory in its lack of power to pass retaliatory measures.

(e) An even more severe challenge will have to be met. For Puerto Rico has been incorporated within the customs union of the United States, is enclosed within the same tariff wall, and has the protection of a mandate to the effect that as between island and mainland merchandise is

to move tariff-free and that no export duties are to be collected on goods coming to the mainland from Puerto Rico. 31 Stat. 77, 41 Stat. 1094.

It is easy to continue this list of questions. But enough has been set down to indicate the facts, the statutes, the stubborn hazards and problems which lie in the way of the acceptance of the tax-tariff theory of Section 207(b). These and like difficulties are not surmounted by the Secretary and the Coast Refiners; they are not even recognized.

IV. The Public Interest.—The interest of the public and of the consumer are in no wise served by the accused section. It is admitted by the Secretary that the island processers can refine sugar the more economically. A thread which runs through the whole of the brief for the Coast Refiners is a fear of the competition of the more efficient insular refiners. There is nothing in the record on the state of the art of refining sugar as practiced on the mainland. But it is a matter of common knowledge that the guarantee of a monopoly to a small compact group of producers does not provide the ideal situation for the elimination of waste and the advance of technology. The refining of beet sugar has been reduced to a single continous process; the accused section closes the door to a similar advance in respect to cane. It is un-American to preserve that which is obsolete. To strike down the accused section is not to strip the coast refiners of their market. It is to force them to make good if they are to hold it. The Constitution contains no injunction against progress.

The question of Puerto Rico's lack of access to the federal political process is met by neither adverse party. The Secretary is silent; the Coast Refiners would meet it by also closing the door to the courts. The Coast Refiners frankly regard citizens of the United States living in Puerto Rico as a subject people to be exploited to the benefit of mainland interest. Article 73 of the Charter of the United Nations, an agreement with other countries properly ratified by the Senate of the United States provides that "Mem-

bers of the United Nations which have or assume responsibility for the administration of territory whose peoples have not attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace that security established by the present Charter, the well-being of the inhabitants of these territories . . ." This article restates obligations assumed by the Treaty of Paris, contains a series of concrete provisions which implement its general principle, and was enacted subsequent to the accused section. Above all, the Constitution, neither by explicit grant nor by implication, confers upon the Congress power to create an empire of colonies.

CONCLUSION.

The question of whether the Congress is authorized by the Constitution to enact the accused section should be directly met and decided.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 32

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SECRETARY OF AGRICULTURE,
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THE GOVERNMENT OF PUERTO RICO, CENTRAL ROIG REFINING COMPANY, WESTERN SUGAR REFINING COMPANY, ET AL.,
Respondents.

BRIEF FOR THE GOVERNMENT OF PUERTO RICO, PETITIONER IN NO. 32, RESPONDENT IN NO. 27.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 32

THE GOVERNMENT OF PUERTO RICO,
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Respondents.

BRIEF FOR THE GOVERNMENT OF PUERTO RICO, PETITIONER IN NO. 32, RESPONDENT IN NO. 27.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the Government of Puerto Rico, a party to the proceedings below by reason of its interest and its intervention, appears before this Court in accordance with its petition for certiorari, granted the 26th of April, 1949. It seeks a review of the refusal of the United States Court of Appeals for the District of Columbia Circuit to consider the validity of Section 207(b) of the Sugar Act of 1948 and to decree the larger and more permanent relief there asked

for in the cause of *Central Roig Refining Company and Western Sugar Refining Company* v. *Secretary of Agriculture*, decided the 24th of November, 1948. Petitioner professes no interest in, and no concern with, the narrow statutory question upon which the Secretary of Agriculture[1] has sought—and been accorded—a review of the judgment below. In accordance with its interest, the Government of Puerto Rico is seeking a review in respect to the constitutional question which, although "fully argued" as the opinion admits, the court below refused to decide. And, in support of this, its prayer for an authoritative answer to the constitutional question presented by this case, the Government of Puerto Rico submits this its brief.

I. FORMAL REQUISITES OF THE SUIT.

A. Opinion Below.

The opinion of the United States Court of Appeals for the District of Columbia Circuit delivered on November 24, 1948, is to be found in 171 F. (2d) 1016.

B. Jurisdiction.

The jurisdiction of this Court is invoked under Section 347, 28 U. S. C. A., as amended, in defense of rights established by the Constitution of the United States and extended to the people of Puerto Rico by the Act of Congress of March 2, 1917, as amended, known as the Organic Act.[1a] It is invoked against Section 207(b) of the Sugar Act of 1948,[1b] which is not authorized by the Constitution and which is repugnant to many of its provisions including among others Article I, sections 8 and 9, Article II, section 3, and the Fifth Amendment.

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[1] Hereafter referred to as the Secretary.

[1a] The relevant sections of the Organic Act of Puerto Rico are to be found in Appendix D.

[1b] The relevant sections of the Sugar Act of 1948 are to be found in Appendix C.

C. The Accused Order.

The order of the Secretary which the court below was called upon to review; and after due notice and proper hearing did reverse, is the Decision and Order of the Secretary of Agriculture Allotting Direct Consumption Portion of 1948 Sugar Quota for Puerto Rico, commonly referred to as Puerto Rico Sugar Order No. 18, and is to be found in 13 F. R. 310; filed January 21, 1948 (R. 160-175).[2]

D. Statutes Involved.

In addition to the Constitution of the United States, the statutes principally involved in the instant case are the Organic Act of March 2, 1917, as amended, establishing the present civil government in Puerto Rico and sections 101, 201, 205 and 207 of the Sugar Act of 1948 (Pub. Law No. 388, 80th Cong., 1st Sess., ch. 519, Aug. 8, 1947).[3]

E. Standing to Sue.

We take it that the issue of the standing of the Government of Puerto Rico[4] to maintain this action, and its justifiable interest in the outcome of this litigation, is not in serious issue. For the following reasons the right of Puerto Rico to be heard, by brief and on oral argument, seems to rest upon solid ground and to be beyond legal challenge.

1. In the proceeding below, instituted by the Central Roig and Western Sugar Refining Companies, the Government of Puerto Rico sought—and was granted—permission to intervene under Section 38(c) (Title VIII, Administrative Agencies Generally) of the Rules of the United States Court of Appeals for the District of Columbia Circuit. A certified copy of the order of the court below to that effect, dated

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[2] Hereafter referred to as the Order.

[3] Unless otherwise specified, the word Act refers to the Sugar Act of 1948.

[4] In respect to petitioner, we use the term which is commonly employed and which was used in the court below. It is of note, however, that the technical term for "the body politic" is the People of Puerto Rico. First Organic Act, 31 Stat. 77 (1900), C. 191, Sec. 7.

June 6, 1948, is on file with the Clerk of this Court, and is reproduced as Appendix A to this brief.

In the court below, the American Sugar Refining Company, and the nine other Coast Refiners,[5] acting in concert and through a single attorney, alone among the parties in interest, sought by motion properly made, to exclude the Government of Puerto Rico from the case. The matter was thoroughly explored in briefs submitted by the adverse parties. The applicable principles of law were there presented; the authorities were expounded; the relevant cases—and a host of irrelevant ones—were cited by the Coast Refiners and dissected by your petitioner. All the arguments of the Coast Refiners, elaborately presented and vigorously maintained, were rejected by the court below.

2. In an answer to the petition for a writ of certiorari asked for from this Court by the Government of Puerto Rico, the Coast Refiners again insisted in a brief in opposition[6] that your petitioner was without "justiciable interest . . . ". In the face of this protest, the petition of the Government of Puerto Rico was granted; and its cause of action, isolated from other petitioners for certiorari, was with a separate number assigned to the summary docket for argument immediately following the causes, whose initial concern is with the statutory question (October Term, 1949, Nos. 27 and 30).

It is of note that respondents, the Coast Refiners, have made no motion in this Court either to reverse the order of the court below recognizing your petitioner's interest and admitting it as a party to the case, or to have this Court dismiss the instant action because of a want of a justiciable interest by the Government of Puerto Rico.

3. The legal authorities presented by the Coast Refiners do not support the contentions which they have twice put forward. In view of the fact that no motion to exclude your petitioner from the case is before the Court, it seems

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[5] Hereafter referred to as the Coast Refiners.

[6] Brief for the American Sugar Refining Co., et al., in Opposition (October Term, 1948, Nos. 575, 580, 585), 14-15.

unnecessary to burden the text of this brief with an exhaustive critical survey of the cases, such as was presented to the court below. It is enough in Appendix B, which by reference is made a part of this brief, in summary fashion to review the authorities.

4. In the instant case the raising of the constitutional issue is in no wise contingent upon the standing to sue of the Government of Puerto Rico or upon its justiciable interest. That issue was in the case while the Secretary was concerned with his Order. It was in the case before—in fact its presence was the occasion for—the intervention of the Government of Puerto Rico. That issue, in their own behalf, was raised by Central Roig and by Western, which companies intend to press it in the instant series of cases.

5. The Government of Puerto Rico, in its petition—granted by the court below—sought "to intervene and to become a party . . . in a dual capacity:"

(a) "In its governmental capacity by virtue of which it is lawfully charged with the obligation of formulating and executing public policy directed to the development of the resources of Puerto Rico, with the advancement of the agriculture, industry and commerce of the island" and "with the linkage of the insular with the continental economy of the United States . . . "

(b) "In its lawfully recognized capacity as *parens patriae* to the people of Puerto Rico as an organized society, whose opportunities for employment and investment of capital, the extent of whose markets outside the island and whose standards of life and material welfare are all substantially affected . . . by a Decision and Order which accepts as valid Section 207(b) of the Act . . . "[7]

Moreover, the Government of Puerto Rico sought—and won—the right to intervene, not only in behalf of itself, but also in behalf of "the people of Puerto Rico, the Planning Board, the Agricultural Company, the Industrial Develop-

[7] Statement of Interest by the Government of Puerto Rico, filed with the court below (U. S. Ct. of Appeals, D. C., No. 9769), 4.

ment Company, the Office of Puerto Rico in Washington, and the various other departments, agencies, corporations and independent establishments through which the functions of state are lawfully performed."[8]

Standing has meaning only in terms of the capacity[9] in which the suitor appears. To deny standing, it would have to be shown that neither in its sovereign capacity[10] nor as *parens patriae* has the Government of Puerto Rico any justiciable interest in the instant controversy. Even if that were done, the fact that the Government operates through a number of corporate bodies would have to be met, and it would have to be shown that they possessed no justiciable interests in the instant cause of action.

6. The Government of Puerto Rico—as well as the various agencies through which it operates—will be bound by the decision of the Court in the instant case. Its interest is different from, and larger than, that of any of the private parties to the action. It will by the judgment of the Court be affected in ways and to an extent which it is not to the interest of private parties to explore. It is a requisite to a wise decision that the Court have before it all that is pertinent to the legal issue raised.

7. To deny to the Government of Puerto Rico standing in the instant case would leave it helpless in the face of the hazard to its body politic, the development of its economy, and the advancement of the welfare of its people inherent in the alleged power of Congress to pass such legislation as is represented by the accused section. For:

(a) In respect to all such matters Puerto Rico has no access to the federal political process. Its two and a quarter million people possess no Senators or Representatives. In the Congress the territory has only a Resident Com-

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[8] Ibid., 3-4.

[9] In the instant case, despite the fact that it owns a number of centrals and would like to refine the sugar grown upon them, the Government of Puerto Rico does not appear in its proprietary capacity.

[10] The Government of Puerto Rico is a sovereign, and has the status of a state in the Union, in that it cannot be sued without its own consent. *People of Porto Rico* v. *Manuel Rosaly y Castillo*, 227 U. S. 270; 33 S. Ct. 352.

missioner, who by the courtesy of that body—there is no law on the subject—is indulged a seat in the House of Representatives but has no vote.

(b) As a body politic within the federal system, the interests of the Government and the People of Puerto Rico might be represented by the United States through the Solicitor General. But, at least in recent years, the Government of Puerto Rico has been left by the federal authorities to handle its own litigation; and that arrangement has grown into established usage. More important, in the instant case, the Solicitor General appears for the adverse party, the Secretary of Agriculture.

Accordingly to deny Puerto Rico standing is to rule that a body politic, under an organized civil government and possessing an accredited status within our federal system, is utterly without administrative, legislative, or judicial remedy.

II. STATEMENT OF THE MATTER AT ISSUE.

The instant case presents two overlapping yet distinct questions. The first is the validity of the Decree and Order of the Secretary. The second is the validity of Section 207(b) of the Act upon which the Order and Decree are predicated. Sugar Order No. 18 and Section 207(b),[11] in legal challenge in the instant case, are technical in character and the justiciable issues which they present are to be understood only against the background of raw sugar, an industry in distress.

For many years the imposition of order and justice upon the raw sugar industry was left to the open market. The various sources of supply were widely scattered. The product extracted from cane and beets grown within the continental United States was insufficient to meet the demand. The great bulk of sugar essential to the nation's needs was purchased in the world market. In respect to

[11] Hereafter referred to either as the accused section or as Section 207(b).

raw sugar the market, giving play to competitive forces, failed in its regulatory office. Tropical growth and the one-crop system conspired to keep supply continuously in excess of a slowly increasing demand. Price was depressed below the cost of production. The growers were too numerous and too distant from each other either to adjust acreage to the ups and downs of price or through collective action to attack the sources of disorder. A competition out of hand resulted in a continuous plague of bankruptcies among the growers and for the workers in a standard of life depressed far below the level of decency.

At last the Government was called upon to take over the regulatory office of the market. The first Agricultural Adjustment Act [12] was directed towards bringing order to the production of the domestic staple crops, in which capacity to produce had outrun market demand. Unlike corn, wheat and cotton, the domestic supply of sugar was inadequate, and there is no mention of it in the Act. But, over the territory extending beyond the continent, from which supplies had to be drawn, the growing of sugar presented a like pattern of disorder and a like call for farm relief. Accordingly in the Jones-Costigan Act of 1934 [13]—set down as an "amendment" to the first Agricultural Adjustment Act—the Congress adapted the current pattern of farm relief to the circumstances of sugar. The legislative intent was to lift the territories from which the continental United States draws its sugar supply to a "plateau" and there to insulate raw sugar against the forces which had brought havoc to the world market. The rationale of this Act was to replace the open market with an administrative control in order that health might be brought to an industry in distress. The Jones-Costigan Act was superseded by the Sugar Act of 1937 [14] which in turn gave way to the Sugar Act of 1948.[15]

Thus in the Sugar Act of 1948 a pattern is imposed upon

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[12] 7 U. S. C. A. 601.
[13] May 9, 1934, C. 263, 48 Stat. 670, Title 7, Section 611.
[14] Sept. 1, 1937, C. 898, 50 Stat. 903; Title 7, 1100-1183.
[15] Aug. 8, 1947, C. 519, Par. 1, 61 Stat. 922; Title 7, Section 1100.

the growing of sugar. For technical reasons, in recognition that principal sources of supply are under foreign flags and because of an important decision of this Court,[16] the Act was written in terms of the number of tons of sugar which annually each supplying territory was permitted to market on the mainland. To that end the Secretary was instructed to determine for each year the total needs of the continental United States for household and industrial consumption. (Act, Section 201.) In accordance with what was right and fair, the total so ascertained was to be broken down and substantial quotas were to be assigned to Cuba, Hawaii, Puerto Rico, the Virgin Islands, the Republic of the Philippine Islands, as well as to the cane and the beet growing regions on the mainland. A small quota was assigned to the rest of the world.

In framing a statute addressed to the plight of raw sugar, the Congress kept the public interest to the front. A sufficient amount of sugar was permitted entrance to meet all domestic demands. No industry or person was to go without. For each of the sugar supplying territories—whether continental or off-shore—access to the mainland market was limited; and each, in lieu of competing for this market, had a quota assigned to it. The restriction has not been severe. The quotas assigned to the cane and beet regions on the mainland and to Hawaii have never been below capacity. In fact no one of these three territories has ever succeeded in filling its quota. Although it could produce at least 200,000 tons more the quota assigned to Puerto Rice has not been outrageously unfair. In the Act, Cuba, a foreign country—which alone can supply all our continental demands—is called upon to give flexibility to the system of control. In effect its variable quota makes up the deficit between our continental needs and the supples available from American territories. Relief from a chaotic con-

[16] In *U. S.* v. *Butler*, 297 U. S. 1, 56 S. Ct. 312, the declaration of the invalidity of the first Agricultural Adjustment Act made necessary the rewriting of its amendment. Hence the Jones-Costigan Act was superseded by the Sugar Act of 1937.

dition has been brought about by a market quota system which in effect imposes a pattern of regulation upon the continental market. As a result the price of sugar has been stabilized at a level high enough to cover necessary costs; economic security has been established for the industry; the standard of life of the workers in the cane and beet fields—alike on the mainland and off-shore—has been substantially advanced. In general, as respects the growing of sugar, the Act has realized the intent which prompted it.

The task of Congress was finished in setting up the system of regulation for raw sugar. In no other farm-relief act has the Congress gone on to impose restrictions, or even a system of regulation, upon the processing of the product.[17] But, in its concern with sugar, the Congress proceeded to graft upon the Act certain alien provisions in respect to refined. In spite of the facts that the source of disorder lay at the farm level, that by the regulation of raw supply had been equated to demand and that accordingly the business of refining could safely be left to the open market, it ventured where there was no legislative need. It did not, however, follow its pattern for raw and establish a system of allocation for refined sugar. It assigned no quotas to the several territories for the processing or marketing of refined. Instead, the Congress in specific terms decreed maxima for the "portions of the marketing quotas" assigned to the several off-shore territories which could be filled with "direct-consumption sugar". Thus, of the 910,000 short tons of sugar raw value which annually Puerto Rico was permitted to market in the continental United States, not more than 126,033 tons were to be imported in refined form. Similar restrictions were set against all the off-shore territories except the Virgin Islands which was

[17] In the first Agricultural Adjustment Act, the Congress did employ the processor, as the most convenient point for the exercise of control. And the processor was forbidden to process the staple commodity grown in excess of the assigned quota. But note that it is the system of farm quotas, not of processed quotas, which is being policed, and that the processor is employed only as an instrument in a scheme of regulation which in essence is farm relief.

permitted to market on the mainland no sugar in refined form. Yet no similar maxima for the amounts they were permitted to market in refined form within the continental United States, were set against any mainland refiners, any group of them, or against their number as a whole.

The character of this act of discrimination appended to a farm relief statute is obvious.[18] Puerto Rico may annually market on the mainland refined sugar up to 126,033 tons, but not a pound in excess. It may market far less than the figure fixed or even none at all. To market any refined sugar, it must compete with the coast refiners for the business. Yet the competition cannot be set in reverse; for the accused section endows the coast refiners with the privilege of refining all sugar marketed in the continental United States, without having to struggle for the business, save for the small portions which off-shore territories may refine and market—if they can get the business.

It is here of note that there is no "quota" system for refined written by the Congress into the Act. For neither in Section 207 of the statute, imposing the restraints, nor on Section 101, where terms are defined, is the word "quota" used with reference to "direct consumption sugar". And Section 207 itself fails to reveal even the outlines of a quota system. The coast refiners are more nearly correct when they insist—as they did in the brief before the court below[19] that the limitations upon the off-shore territories are "compensation" to them for limitations which the Act had placed upon their sources of supply. Thus, save for the small quantities specified, Section 207 makes the off-shore territories ineligible to refine sugar for the continental market. It vests, save for these small driblets, the right to refine all sugar to be marketed on the

[18] If Section 207(b) of the Act is valid, other sections may be invoked to instrument it. These other sections also instrument other provisions not challenged here. Thus the severance, by a declaration of invalidity of Section 207(b) or of subsection (a) of the same section as well, will in no wise impair the validity of the rest of this Act unchallenged here.

[19] Reply Brief for the American Sugar Refining Company, et al. (U. S. Ct. of A., D. C., No. 9769), 8.

mainland in the coast refiners. In a word, the Congress, in grafting an alien provision on the Act, treated the continental market as a proprietary domain, upon which, save for minor concessions, the American off-shore territories were forbidden to trespass.

III. HISTORY OF THE INSTANT CASE.

A. The Order, Issues and Judgment.

On January 16, 1948, the Secretary, seeking to secure "an orderly and adequate flow of sugar" and in accordance with Section 205(a) of the Act, issued Sugar Order No. 18 (R. 160-175) allocating among the sugar refiners of the island the maximum of 126,033 tons of refined sugar[20] which Puerto Rico was permitted to market on the mainland. On February 11, 1948, the appellants, the Central Roig and Western Sugar Refining Companies, being dissatisfied with the allocations granted them, sought a review of the order, and questioned the power of the Secretary of Agriculture to make it, in the court below (R. 180-182).

Thus there was presented to the United States Court of Appeals for the District of Columbia Circuit two legal issues.

1. The first, lesser and more immediate question was whether the allocation for the year 1948 of the direct consumption portion of the sugar quota for Puerto Rico did or did not constitute a "fair, efficient and equitable" distribution in accordance with Section 205(a) of the Act.

2. The second, greater and more enduring question was the authority of the Secretary to issue any allocation order in respect to refined sugar or to appoint any limit to the portion of its sugar quota which Puerto Rico could fill with "direct consumption sugar". In other words, it is whether

[20] In technical terms, "direct consumption sugar" is a somewhat broader term than "refined sugar", since it includes all sugar—even semi-processed and raw—which is ready for direct consumption. But, since the terms are so nearly equivalent, simplicity demands the use of the shorthand term "refined sugar", save where statutory language is being quoted, in this brief.

Section 207(b) of the Act, imposing a maximum upon the portion of the sugar quota to be marketed by Puerto Rico within the continental United States which may be filled with refined sugar, represents a valid exercise of an authorized power of the Congress.

It is evident that the two questions are distinct and invite separate answers. For if the Order were found valid, the authority to issue it would still be in question.[21] And if the accused section were found to be authorized by the Constitution, the issue of conformity to standards in the statute would still have to be met. It is true that if Section 207(b) were to be held invalid, the Order would fall with it. But if the Order were held invalid it would not dispose of the challenge to the validity of the accused section. For a decision adverse to the Order could do justice among Puerto Rican refiners only within the confines of the 126,033[22] maximum tons available for allocation. If the insular refiners, like their brethren on the mainland, were able freely to expand their operations, relief could come only from a declaration of the invalidity of the accused section. To avoid the discrimination whereof these refiners and the Government of Puerto Rico complain, the accused section would have to be proclaimed null and void.

In respect to these two issues the lines of legal battle were sharply drawn in the court below. The Central Roig and Western companies confronted the Secretary on both questions. The intervention of the Porto Rican American Sugar Refinery, Inc. was limited to a defense of the Order. The American Sugar Refining Company, et al., and the Government of Puerto Rico, professing no interest in the allo-

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[21] It is admitted by the Secretary that if, reversing the court below, the Order is held valid, there will still be the constitutional question to face. Petition for a Writ of Certiorari (Oct. Term, 1949, No. 27).

[22] The figure 126,033 represents the maximum tonnage available. It is to be remembered that this amount does not go to insular refiners by prescriptive right; it merely marks the outside limit within which insular may compete with continental refiners for the business. The actual tonnage is less than the figure given by the amount of this business which mainland may secure against the competition of insular refiners.

cation, entered the case, the one to defend and the other to attack the validity of the accused section.

After the presentation of briefs, and an oral argument before Edgerton, Clark and Wilbur Miller, J.J., the court below on November 24, 1948, handed down its judgment. In respect to the narrow question it found that the allocations made by the Secretary in Sugar Order No. 18 were not in accord with the standards set down by Congress in Section 205(a) of the Act. Accordingly, "we must reverse it and remand the case" to the Secretary. In respect to the broader question it made no finding. In the words of the decision, "a majority of the court are of opinion that since the order is not authorized by the Act we cannot, within established principles of review, undertake to decide whether Section 207(b) of the Act is authorized by the Constitution. All agree that this question has been fully argued, and my own view"—that is of Edgerton, J., the spokesman for the court—"is that we should decide it." The failure to decide this larger question is the issue upon which the Government of Puerto Rico has asked this Court for a hearing.

B. Specification of Errors.

The questions presented by the action of the court below, whose judgment this Court is asked to review, are explicit in the Statement and History just recited and require little elaboration here. The specific errors of the court below, each involving an important issue, now presented to this Court, are three in number.

1. *The Court Below Erred in Denying to a Party in Interest, in a Case in Which the Issue Was Properly Raised and "Fully Argued" in Respect to a Matter of Consequence, a Definition of Its Legal Rights.*

In the proceeding below, the Government of Puerto Rico presented to the court an important question, properly raised and fully argued, involving a definition of its own

rights.[23] It there insisted that the accused section, and the power of the Congress to pass it, rested upon no constitutional warrant; that the arbitrary legislative discrimination was a denial of the civil rights of the people of Puerto Rico, including the ancient liberty of the trade; and that the singling out of Puerto Rico as an object of congressional disfavor put in jeopardy the public policy of the insular government, made difficult the enlargement of its economic base, and arrested its progress.

In its opinion, the court below set down no adequate reason for its failure to give the answer to which petitioner is entitled. Its only explanation was that, inasmuch as "the order is not authorized by the Act", the court "cannot within established principles of review, undertake to decide whether Section 207(b) is authorized by the Constitution." But it gives no definition of these "established principles of review", and a diligent search through the law reports has failed to disclose them. It is true, of course, that if an administrative order is struck down for failure to conform to the statute, it is not necessary for the court to kill what has already been killed by reciting constitutional objections.

But in the instant case the court below was confronted, not with a single simple question, but with two distinct even though related issues. The first question concerned the validity of the allotments under the Order; the second, the authority to issue any allocation order. The parties bringing the suit sought a double relief, first a larger share of the 126,033 tons which the Secretary was allocating; second, a freedom from the restriction of the accused section, so that they could refine as much of the quota of 910,000 tons, which Puerto Rico was permitted to market on the mainland, as they could secure in competition with other insular and all continental refiners. The court, in deciding the statutory question, insisted that Central Roig and Western should have had more, and Porto Rican American less of the lim-

[23] The very substantial interest which led the Government of Puerto Rico to challenge the validity of Section 207(b) of the Act is recited in summary form in pp. 19-23 below.

ited number of tons to be allocated. In refusing to decide the second question, the court failed to state whether Porto Rican American, as well as Central Roig and Western, were free, exercising their constitutional rights, to seek to expand in disregard of the strait-jacket which the Congress had sought to impose upon their operations. By the court's action, a narrow and temporary relief was granted; by its refusal to act a broader and more enduring relief was denied and the interests of the Government of Puerto Rico and its people were overlooked. If two distinct questions are raised, they remain distinct questions; they do not become a single question because in separate ways they are concerned with the same administrative order. It is submitted that as an interested party with a substantial interest in a proceeding in which the question has been properly raised, the Government and the People of Puerto Rico are entitled to a definition of their rights.

2. *The Court Below Erred in Answering the Questions, Properly Presented to and Fully Argued Before It on The Administrative and not on the Constitutional Level.*

The issue here, involving a clash of claims between private parties, is of no legal concern to the Government of Puerto Rico. It has no desire to play favorites among the persons who claimed allocations, all of whom are its citizens. It must, however, point out that the enduring question of the shackles imposed upon off-shore sugar refining cannot be answered upon the administrative level. At the time the decision of the court below was made, November 24, 1948, all sugar subject to the Order under attack had already been marketed. It was too late to change the allocations for 1948; and—aside from a series of minor "clean-up" questions [24]—there was no practical reason for the Secretary to

[24] It seems clear that the petitioners who won below, if they are sustained here, have no claim against the United States, because of an unlawful order of the Secretary. Nor upon currently established principles of law is it easy to see how Central Roig and Western have a cause of action against Porto Rican American who secured and marketed a portion of the allotment to which—if in this matter their victory below is not here reversed—they were entitled.

revise his Order. Nor was there anything upon which the Order after revision could have taken effect. The court's judgment is thus largely moral; it is an admonition to the Secretary, in shaping the orders for 1949 and subsequent years, to be more careful to insure that the allotments meet the standards in the Act. But each year demands its own order; and there is no compulsion upon the Secretary to avoid the infirmities of an outlawed order in writing one to meet the not quite identical circumstances of a subsequent year. In fact the similar Puerto Rico Sugar Order for 1949 [25], in which it has been alleged that the Secretary failed to heed and to follow the statutory decision of the court below, is now under legal attack.[26] There the two dominant questions of the instant case are again raised; and there, as appellants or appellees or intervenors, all the parties to the instant case are to be found. Certainly the reiterated challenge of annual orders is not an effective way to a judicial disposition of the issues here raised.

The sequence of administrative hearing, order, petition to the United States Court of Appeals for review, hearing and decision, and a possible appeal to this Court is likely to consume the greater part or even the whole of the year. Meanwhile all the sugar is marketed under an order which is presumed to be valid. And when validity or invalidity is finally determined, it is too late for a revised order to correct error and to give real relief. The repetition of the case, with the same combatants and the same issues, makes it clear that the questions here presented will not down until definitive answers are given by the court of last resort.

The dominant issue, it must be repeated, is presented, not by the specific allocations in the Order, but by the authority of the Congress to promulgate the mandate upon

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[25] Allocation of Direct Consumption Portion of the 1949 Sugar Quota for Puerto Rico, 14 F. R. 1567-1570.

[26] *Central Roig Refining Company and Western Sugar Refining Company* v. *Secretary of Agriculture, et al.* (U. S. Ct. of App., Oct. Term, 1949, No. 10232).

which the Order is predicated. The dominant protest, alike of the Central Romana and Western Companies and of the Government of Puerto Rico, is the wall which the Congress has erected to block the expansion of the sugar refining industry in Puerto Rico. It is a disservice to all parties who have a stake in the industry to wage a petty and protracted legal campaign along the administrative front. The validity of Section 207(b) is the heart of the controversy and we submit that Judge Edgerton was right in insisting that the court below should have decided it.

3. *The Court Below Was in Error in Refusing to Decide whether or not Section 207(b) Is Authorized by the Constitution.*

It is clear, from the foregoing paragraphs, that the court below was in error in its failure to decide whether or not the accused section was authorized by the Constitution.[27] The two questions before it, although concerned with the same order, are distinct. To rule that the Order was not in conformity with the standards of allocation set down in the statute, neither disposed of the constitutional question nor precluded the necessity of a ruling upon it. Nor has any party been able to demonstrate that the necessity for a ruling on the constitutional question has been precluded. There is no reason why—whatever be the ruling on the specific allocations in the Order—it should not be decided now.

A remand to the court below with instructions to answer will serve no useful purpose. It is understandable that, in the performance of its appellate office, this tribunal as a usual custom demands that the matter in issue be first pro-

[27] A ruling to the effect that there may be error in the failure of a United States Court of Appeals to decide a question properly raised and fully argued is to be found in *Federal Trade Commission* v. *Goodyear Tire and Rubber Co.*, 304 U. S. 257, 58 S. Ct. 863, involving Section 2, the quantity discount provision in the Clayton Act. The Sixth Circuit had refused to decide the question before it, and the Supreme Court in a memorandum opinion remanded the case with a directive "for a determination of the merits."

cessed by a lower court. The rule is salutary, and in most instances contributes to wider knowledge, sharper analysis, and more informed judgment. The instant case presents the clear exception to the rule. Here the facts are fully presented and none of them is in dispute. Here the parties are all in agreement as to the statutory and the constitutional questions which are involved; these questions are stated by the adverse parties in almost the same words. The constitutional question presents a series of issues at law which must be resolved by oral argument and the presentation of briefs; and ultimately it must be resolved by this Court. Since the case already presents a clear-cut constitutional issue, entirely uncomplicated by other considerations, this Court is as well prepared to entertain the issue as if the court below had expressed an opinion upon it.

IV. THE INTEREST OF THE GOVERNMENT AND THE PEOPLE OF PUERTO RICO.

The Government of Puerto Rico has an interest in this case far greater than that of any of the private parties.[28] It intervenes in behalf of itself, the People of Puerto Rico, the Planning Board, the Agricultural Company, the Industrial Development Company, the Office of Puerto Rico in Washington, and the various other departments, agencies, corporations, and independent establishments of the Insular Government, through which the functions of state, sovereign and proprietary, are performed. It is prompted to support this action, because it is under obligation to realize its economic potential: to develop its agriculture, industry and commerce; to link the insular with the continental economy; to raise the standard of life of its citizens to a minimum of decency; and to rescue its people from a plight which would bring disaster to a less resolute and resourceful population.

[28] This section is an abridgement of the Statement of Interest by the Government of Puerto Rico, presented to the court below, and on the basis of which its motion to intervene in the instant case was granted. For the sake of brevity the language—but in no case the substance—has been somewhat altered. (U. S. Ct. of Ap., D. C., No. 9769.)

It has formulated and is putting into effect a public policy embracing a number of measures through which it hopes to realize these objectives. Its whole program is placed in jeopardy, if this Court holds that the Congress has power to pass the kind of Act represented by the accused section.

Puerto Rico is a territory of the United States. It is eight flying hours from New York City. It is only 100 miles long and 35 miles at the widest. Not more than one-third of its territory is arable land, and of this a large part is marginal. In this confined area a population of 2,200,000 is crowded. The population density is 600 per square mile, fourteen times as great as that of the continental United States. Its agriculture cannot be made intensive enough to support so many persons. It must, if it is to survive, export the labor of its people in the form of "value added by manufacture"; and the higher the skills which go into the goods it sends to the mainland, the greater the volume and value of the products it receives in return. In a word, there is no salvation for Puerto Rico but in industrialization and commerce with the continent.

The island was ceded by Spain to the United States in 1898. Its dominant language is still Spanish, although almost all in the higher income groups also speak English. Its Spanish tradition is slowly yielding to American ways; and its economy, closely linked with that of Spain at the turn of the century, is now oriented to the United States. Although the Insular Government spends one-half of its income on education—a higher percentage than any state in the Union—facilities for learning are still inadequate and the illiteracy rate is still high. The people are highly endowed with potential skills, and training in the industrial arts is bringing out latent talents. The people of Puerto Rico, under the Organic Act as amended, are citizens of the United States, endowed with all the rights and privileges of the citizens of the several states.

The island's economy—the ways and means of life for

its people—has by tradition been agricultural. The dominant crop and the first source of income is raw sugar. Next comes the distilling and sale of rum. Then comes tobacco, pineapples and coffee. But even the new agriculture, resting upon fruits, vegetables and cut flowers of high quality and value, cannot support a population of such density. Although to some extent the pressure of the people upon the land is being relieved by migration to the continent,[29] there must be a shift—a rapid and extensive shift—to a refining, processing, manufacturing base, if the island is to support its population.

In view of this situation, the Government of Puerto Rico has recently embarked upon a comprehensive program for promoting new crops, bringing factories to the island, stimulating trade, and forming "a more perfect union" with the continental United States. To that end it has made a survey of its economic potential, revised its pattern of taxation, set up agencies of government to execute its program, and invested large sums of money in its industrial future. In the policy of the government, expanding opportunity for employment has come to be a first necessity. Section 207(*b*) of the Act—and the reputed power of the Congress on which it rests—puts in serious jeopardy the whole of the Government's program.

The Government of Puerto Rico has a duty to resist every attempt to drive it back upon agriculture and to fasten upon it a colonial status. Its citizens are citizens of the United States and it is under obligation to see to it that

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[29] As citizens of the United States the people of Puerto Rico are legally free to go and come between island and mainland. But as a practical matter that freedom is severely restricted. It cannot, as upon the continent, be effected by a series of moves each at low cost. The overwhelming mass of the population is poor, the per capita income being lower than for the lowest state in the Union; to raise the money for passage to the mainland is an exacting task. The cheaper forms of transport—railway coach, motor bus, flivver—everywhere present on the mainland—are not available between continent and island. Passage only by air at long distance prices, will serve. As the Governor of Puerto Rico graphically puts it, "There ain't no busses running from the Bronx to Mayaguez." An attempt of the Government of Puerto Rico to secure an air service on the coach and motor-bus level is now pending before the Civil Aeronautics Board, Proceeding No. 2123, entitled Additional Service to Puerto Rico.

equality is preserved; that discrimination is avoided; that the rights and privileges of its citizens—including the ancient liberty of a trade—are not denied or abridged to the benefit of other citizens of the United States who happen to live and do business on the mainland. The distance of the island from the continent—ranging from 1200 to 1800 miles—and the inheritance of a Spanish culture impose serious obstacles to the full incorporation of Puerto Rico into the federal union known as the United States of America. The Government of Puerto Rico is under a duty to support every measure which makes for, and to oppose every measure which works against, such a development of the island, its culture and its full and rightful place in our political system. Above all, it is under a duty to see to it that in a belated revival of the Old Colonial System the Congress does not appoint Puerto Rico to the office of producing raw materials for mainland manufacture.

In a word, the future of Puerto Rico and its people rests on the judgment passed upon Section 207(b). For if the Congress can limit the amount of sugar which in refined form the people of the island are permitted to market on the mainland, it can decree—as it has already done for the Virgin Islands[30]—that Puerto Rico can market on the continent no sugar ready for direct consumption. If in respect to sugar, the Congress can limit the mainland market to the raw product, it can do the same thing in other industries, and thus impose a direct prohibition against the processing, refining and manufacture of any finished commodity on the island—save for local consumption. The fate, therefore, of insular industries devoted to such products as cement, plyboard, furniture, textiles, distilled spirits, and glass containers, is tied up in the present case.

Nor here is it to be forgotten that Puerto Rico possesses no political power, aside from its limited control over its insular economy, to shape its industrial, social, and cultural destiny. Although it has been accorded an increasing par-

[30] Section 207(c) of the Act.

ticipation in insular affairs, as yet it enjoys no access to the federal political process. As a minority, remote from the mainland and without recourse to the Congress, its two and a quarter million people must depend upon this Court to vindicate their rights as American citizens.

V. SUMMARY OF ARGUMENT.

The accused section is not authorized by the Constitution; and in enacting it the Congress exercised a power never delegated to it. It invades the civil rights of the people of Puerto Rico, including the ancient liberty to and within a trade; derives neither sanction nor support from the territorial clause; attempts unlawfully to reduce Puerto Rico to the status of a colony; transgresses a treaty between the United States and Spain; violates specific provisions, as well as runs counter to the very spirit, of the Constitution; and leaves the destiny of Puerto Rico to the operation of a political process, to which neither its government nor its people have access.[21]

VI. ARGUMENT.

A. The Citizens of Puerto Rico Are Citizens of the United States and as Such Possess All the Rights and Liberties Guaranteed to Persons and to Citizens by the Constitution, Including the Ancient and Established Liberty to and Within a Trade.

The issues presented by this case reach through the Constitution to the very fundamentals of popular government. Our political order, like all of its kind, derives its just powers from the consent of the governed. The source of all the powers of State is the people; and the Congress can enjoy

[21] A more detailed summary of the argument in a series of legal propositions is presented in the Table of Contents above.

and exercise only such powers as are granted to it by the people. In our own, as well as in all popular governments, the people reserve to themselves all powers which they have not specifically delegated. The rights and liberties reserved to the people lie outside the province of government and by constitutional guarantees are secured against its trespass or invasion.

1. *The People of Puerto Rico While Under Spanish Rule Were Established in the Basic Rights and Liberties Which Are the Heritage of All Free Peoples.*

The ancient rights and liberties of the people are no monopoly of Anglo-American law. Although they differ in detail and in idiom of expression, they are the common heritage of the countries of western Europe. Their existence, belonging to the very substance, is independent of the form of government. They have since time immemorial fixed the legitimate frontiers of political authority; in their name the royal prerogative has been subdued into constitutional government.

The rights and liberties of the people of Puerto Rico are of ancient standing. For centuries they were accepted as the legacy of the Spanish people; and when, with the coming of alien dynasties, the theory of the divine right of kings came into vogue, they were asserted as occasion offered.[32] Little by little, as the king's pleasure was subdued into lawful rule,[33] they won a renewed recognition.[34] In due time through the Constitution of 1876—which in form is a compact between the people and the Crown—an obligation

[32] The antiquity of the idea of liberties of the people reserved against the State and of access to the courts to vindicate reserved rights is not generally appreciated. A full account is set down in William Robertson, History of the Reign of Charles the Fifth, Section III of the first part, preceding Book I. See particularly notes XXXI and XXXII.

[33] Spanish Constitution of 1876. This document and the others mentioned in this section concerned with the liberties of the People of Puerto Rico, before the passage of the Foraker Act, along with a number of others, are to be found in the Documents on the Constitutional History of Puerto Rico.

[34] Constitution Establishing Self-Government in the Island of Puerto Rico by Spain in 1897.

was imposed upon the government to secure to the people their ancient rights and liberties. Their importance is attested by their recitation as Title I [35] of this instrument of popular government. In Articles 2 and 12 of Title I, the liberty of a man in respect to his trade is clearly recognized.[36] Article 12 asserts that "every person is free to select his own profession." Although it is added that "it pertains to the state to issue professional diplomas and to establish standards for those who seek them", the clear intent is that the standards shall be uniform. Article 2 extends this liberty from the "citizen" to the "person" and specifies that "foreigners may establish themselves freely in Spanish territory, may pursue therein their callings, or may follow any profession for the pursuit of which the law does not demand certificates."

The specific guarantee of a man's right to his trade and his liberty within it is reinforced by other provisions of the Constitution. Like our own similar guarantees, it is woven into a document whose very purpose is to abate the absolute power of the Crown. Title I contains, in an idiom indigenous to Spain, a great deal of the substance of our own Bill of Rights. Thus, although "the person of the King is sacred and inviolate", his "ministers are responsible for his acts" and "no royal order shall be executed unless countersigned by a minister who by this deed alone assumes full responsibility". (Title IV, Articles 48 and 49.) The King must be authorized by law to carry out any one of a number of acts of state. (Title VI, Article 54.) By Title IX, the principle of equality before the law is recognized; and it is specified that "the same codes shall govern throughout the monarchy." Although, as is essential when dealing with territories widely scattered, the law must admit "variations determined by particular circumstances", it is specified that with such modifications as are "deemed suitable" there

[35] In the usual translation the Constitution is divided into Titles which are subdivided into Articles; the Articles are numbered consecutively. In some translations the document falls into Articles, divided into Sections.

[36] Constitution of 1876, Title I, Secs. 2 and 12.

shall be applied to "overseas provinces" the laws "which may be promulgated for the Peninsula." (Title XII, Article 88.)

The Old Colonial System hung heavily over Spanish rule. Fact did not measure up to profession; Puerto Rico, like other colonies, was exploited for the benefit of the homeland; and an extension of the civil rights enjoyed by Spaniards living on the Peninsula to Spaniards living in the Antilles was a slow matter. It was not until 1897 that, by a Royal Decree countersigned by the President of the Council of Ministers, a Constitution establishing self-government for the Island of Puerto Rico was promulgated.

This Constitution begins with an extended Preamble addressed by "the Government" to Maria Cristina, the Queen Regent. This Preamble has been generally accepted as the authoritative guide in interpreting the provisions which follow. It, therefore, warrants recitation in some detail. The whole Preamble is animated by the spirit of dealing with Puerto Rico, not as a colony, but as a Spanish territory. The basis of the new system rests upon the harmony of interests of the two countries, a scrupulous respect for mutual rights and obligations, and the desire on the part of the mother country to aid "unceasingly in the development, prosperity and peaceful progress of her beautiful Antilles." The Government will not "withdraw"—or consent to the withdrawal—from Puerto Rico of "any part of what constitutes the liberties, the guarantees, and the privileges" of the people of the island. It is admitted that interests have been vested, based upon mercantile restrictions. It is stated that the transition from the Old Colonial System must be effected gradually. But the Preamble announces that "discrimination" against the Antilles for the benefit of the metropolis is "altogether incompatible" with the "autonomy" it seeks to establish. The need of "markets" for the "rich and abundant products" of Puerto Rico and the "inevitability" of a change "in the commercial system" is clearly recognized. Citizens of Puerto Rico are

citizens of Spain and are to be treated as such. Their interests are not to be sacrificed to those of persons living on the Peninsula. The interests are not in conflict. The very purpose of the Constitution is "to attain a greater degree of prosperity, security and importance for Puerto Rico."

The autonomous government set up for Puerto Rico follows the general outlines of representative government. The island is accorded representation in the Cortes of Spain. At the time of its cession to the United States, Puerto Rico held seats in the Senate and in the Congress of Delegates meeting in Madrid. The island was accorded its own "insular parliament", consisting of the Council of Administration and the Chamber of Representatives. The power of the insular parliament, like that of the Cortes of Spain, was limited by the guarantees of the rights and liberties of Spaniards and of persons as set down in Title I of the Constitution of 1876. Upon the Governor-General was specifically imposed the "power" and "responsibility" to forward for review to the Council of Ministers sitting in Madrid all legislation which he deems to encroach upon these fundamental guarantees (Insular Constitution, Articles 1, 43, and 51). Access to the courts against a violation by "a municipality or a provincial assembly" of rights guaranteed by Title I of the Spanish Constitution and for the redress of grievances is specifically provided. (Article 63.) Such an "abuse of power" is held to be directly contrary to the law of the Constitution. In the insular Constitution the commercial relations of Puerto Rico are made a matter of primary concern, and the relation of the Island to the Peninsula receives particular attention. It was recognized that preferential duties were of long standing and could not at once be abandoned; but in respect to such imposts, Puerto Rico was not at the mercy of the Cortes. Instead, in case of disagreement, "the point in dispute" was to be submitted to a committee of representa-

tives of the Cortes, consisting of an equal number of Puerto Ricans and Peninsulars.

It is unnecessary to continue this recitation. At the time of its cession to the United States, Puerto Rico was represented in the Cortes, had an autonomous government of its own, and might bargain with—but did not have to take orders from—Spain in respect to its industries and trade. Its citizens were citizens of Spain, endowed with all the rights and liberties of Spaniards. The bill of rights—set down in Title I of, rather than attached as an Appendix to, the Spanish Constitution of 1876—proclaims liberties differing somewhat in detail and to some extent cast in another idiom, but on the whole remarkably like those in our own Bill of Rights. Among these the right of a man to, and his liberty within, his trade receive specific mention. The powers of the insular parliament, like those of all branches of government, are strictly limited. With the Puerto Ricans, as with us, these liberties belonged in a province reserved to the people and beyond the reach of government. The Old Colonial System, exploiting overseas possessions for the benefit of the privileged on the Peninsula, was a violation of these liberties. This "commercial system" Spain had agreed to bring to an end. When the United States acquired Puerto Rico, its people were living under the Spanish Constitution of 1876 and the Insular Constitution of 1897.

2. *The United States, in Occupying the Territory of Puerto Rico, Was Quick to Recognize the Established Rights and Liberties of Its People.*

The campaign of the United States against Spain was not a war of conquest. It was preached and officially proclaimed as "a crusade for liberty." The United States came to the aid of patriots, particularly in Cuba, who were in rebellion against Spanish authority. Its aim was to abate the severities of the Old Colonial System, not to ex-

ploit the people of the Spanish Antilles for the benefit of our own continental interests. There was no intent, in respect to Puerto Rico, to substitute the yoke of the United States for the yoke of Spain.

In the period between occupation and formal cession to the United States,[37] the military was careful to make clear that the United States did not come as conquerors. In a letter, dated July 28, 1898, and addressed "to the Inhabitants of Puerto Rico," Nelson A. Miles, Major General, commanding the United States Army, proclaimed that the war was waged "in the cause of liberty, justice and humanity." The "people of the United States . . . bearing the banner of freedom . . . bring you the fostering arm of a nation of free people whose greatest power is justice and humanity to all living within its fold." Its aim is "to bring protection, not only to yourselves but to your property, to promote your prosperity, and to bestow upon you the immunities and blessings of the liberal institutions of our Government . . . it is not our purpose to interfere with any existing laws and customs that are wholesome and beneficial to your people". This proclamation was intended to give effect to Executive Order No. 101, A. G. O. of that year signed by the President of the United States. In a letter of instructions sent out the next day from Headquarters of the Army to subordinate commanding officers, it was proclaimed that, so long as the people of Puerto Rico "yield obedience", they are to have "security" in respect to person and property and "all other private rights and relations." Therein it is expressly stated that, under the military rule, "the freedom of the people to pursue their accustomed occupations will be abridged only when it is necessary to do so."

The formal cession of Puerto Rico, by Spain to the United

[37] This cession was effected by the Treaty of Paris, 1898. A tradition which persists in the island to this day has it that representatives of Puerto Rico, sitting in the two houses of the Spanish parliament, voted to ratify the treaty, and thereupon, immediately vacated their seats. A check of this tradition has been impossible, since we have been unable to find the record of the sessions either in San Juan or in Washington.

States, was effected by the Treaty of Paris, "done in duplicate" on December 10, 1898.[38] The provisions in the Treaty in respect to the rights and liberties of the people are not spelled out in great detail. Article IX, concerned with political allegiance, gives certain protections to Spanish citizens who "remain in the territory" and provides that "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." And Article VIII, after providing in detail for the transfer of public property, such as public buildings, structures, highways, barracks, forts and roads from the one sovereignty to the other, specifies that such "relinquishment or cession . . . cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds", whether of local public bodies, or "of ecclesiastical or civil bodies or any other associations . . . or of private individuals of whatever nationality . . . " These provisions are in accord with the elementary principles of international law: One sovereign can cede to another only that which it possesses. Accordingly public property is transferred, but private property—whether realty, chattels or intangibles—remains with its former owner. It is obvious that the rights and liberties of the people belong to the category of private property and all personal rights, all ancient liberties, are to be left to the full enjoyment of the individuals at the time legally possessed of them. The verb "cannot" and the phrase "which by law belong to" are advisedly chosen.[39]

For the Kingdom of Spain did not transfer, it did not attempt to transfer, it could not by law have transferred, the properties, the rights, and the liberties of the people—or any control over them—to another political state. The

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[38] Ratifications exchanged and treaty proclaimed on April 11, 1899.

[39] Whether Puerto Rico is a territory, incorporated or not incorporated into the United States, has nothing to do with the matter. The error in contending otherwise is attested by the fact that in respect to rights and liberties, the people of Puerto Rico have from the first had the equivalent, and are now in full possession, of United States citizenship.

Spanish signers of the Treaty were aware that they could not sign away the inalienable liberties of the people which stemmed from a source older than the government itself. For by the compact between People and Crown, which is the Constitution of 1876, the peoples of Greater Spain, including Puerto Rico, had reserved unto themselves the traditional liberties; and the Crown of Spain possessed no power to transfer to another sovereign that which it did not itself possess. Though the matter need not be pursued here, it is not easy to see how the United States, a popular and constitutional government, even had it been proferred, could have acquired from Spain the power to quash or abridge these ancient liberties.

At the time there was clear recognition by the officials of the military government of Puerto Rico that there existed no authority to abridge or deny the liberties of the people. The whole matter is set forth in detail in an Allocution by the commander of the military forces, dated August 15, 1899, which he caused to be published in all the local papers. The military is to be tolerated for a time, because "it is impossible to supply any other form of governmental control." But—note the easy shift from the Spanish Constitution to our own—"an arbitrary government over any territory included within the United States is not contemplated by the American Constitution and laws"; for our "whole theory of government is based on the principle that the people themselves are to make and enforce their own laws." It follows that by every means, it "has been the practice of the military . . . to learn the views and wishes of the people themselves," and to adapt to their views the systems of laws and administration which the Congress was expected presently to establish. The current transition stage was to be "one preparatory" to "full statehood" and "membership in the National Union." And, "whatever compromises might for a short time be demanded by military exigency," the end was "complete territorial autonomy." A bad economic state "was ad-

mitted to exist . . . in many municipalities"; changes had to be made in order that "self-government and full autonomy" might be instituted; and time was necessary to bring the government into accord with the principles of law, equity and absolute justice. In particular it was proclaimed that the tariff and trade laws now prevailing were soon to be materially changed so that an impetus might be given to industrial development and remunerative labor found for the unemployed. The task was "to make ready this island for a territorial regime when Congress shall be ready to enact it."

3. *To the Citizens of Puerto Rico Have Been Extended All the Rights and Liberties Which Attach to Citizenship of the United States.*

The period of military occupation was brief. There followed a short transition period, extending from the ratification of the Treaty of Paris to the establishment of the civil government for Puerto Rico, provided for by the Foraker Act of Apr. 12, 1900, C. 191, 31 Stat. 77.

The rights and liberties which the people of Puerto Rico had enjoyed as Spaniards were not to be lost; instead the Act did much towards converting these ancient liberties into the larger and richer rights of United States citizenship. Although the Governor was to be appointed by the President, and, instead of the representation which the island had enjoyed in the Cortes, a single Resident Commissioner was provided, the Act did accord to Puerto Rico a large measure of local self-government. "All inhabitants continuing to reside in Puerto Rico who were Spanish subjects on the 11th day of April, 1899"—unless by formal declaration they chose to remain citizens of Spain—and "their children born subsequent thereto", became citizens of Puerto Rico; and they, "together with such citizens of the United States as may reside in Puerto Rico", were to

"constitute a body politic under the name of The People of Puerto Rico." (Act, Section 7.)

In the People of Puerto Rico rights and liberties of old were recognized and enlarged. "The laws and ordinances of Puerto Rico" were to "continue in full force and effect . . . so far as the same are not inconsistent or in conflict with the statutory laws of the United States." (Act, Section 8.) In fact, all "the statutory laws of the United States not locally inapplicable" were to have "the same force and effect in Puerto Rico as in the United States." (Act, Section 14.). To citizens of Puerto Rico writs of error and appeals were to be allowed from local courts to the United States Supreme Court "in all cases where the Constitution of the United States or a treaty thereof or an Act of Congress is brought into question" (Act, Section 35). The powers of the Governor and of the Attorney General of the Insular Government are written in terms of "the powers of a Governor or an Attorney General of a Territory of the United States" (Act, Sections 17, 21). A "commission" was to be authorized "to compile and revise the laws of Puerto Rico, . . . to frame and report such legislation as may be necessary, to make a simple, harmonious, and economical government, . . . and make all other provisions that may be necessary to secure and extend the benefits of a republican form of government to all the inhabitants of Puerto Rico." (Act, Section 40.)

This process of enlarging and enriching the ancient liberties of the people of Puerto Rico has constantly gone forward. In 1917 the Jones—technically known as the Organic—Act succeeded the Foraker Act. In it the Bill of Rights is put to the front (Act, Section 2); and in the words, "no law shall be enacted in Puerto Rico which shall deprive any person of life, liberty or property without due process of law" there is withdrawn from the local legislature—as there had been withdrawn from the Congress itself—the power to deny or abridge the ancient rights of the people. The insular legislature is given great latitude

in respect to internal revenue; yet it is provided (Act, Section 3) that "no discrimination" shall "be made between the articles imported from the United States . . . and similar articles produced or manufactured in Puerto Rico." The context of the document makes it clear that, as between Puerto Rico and the United States, such a prohibition upon discrimination is meant to be reciprocal. The body politic of Puerto Rico is enlarged to include natives who were absent from the island when its inhabitants in 1901 were blanketed into citizenship; citizens of the United States who have resided in the island for one year are granted Puerto Rican citizenship; all natives whose fathers elected Spanish citizenship, and "are attached to the principles of the Constitution of the United States," are permitted to become Puerto Rican citizens; and all citizens of Puerto Rico "are hereby declared and deemed to be citizens of the United States," and are now vested with all the rights and liberties of citizens of the several states (Act, Section 5, and amendments set down as 5a, 5b and 5c; Acts of Congress approved March 4, 1927, June 27, 1934, and May 16, 1938).

The Organic Act has been many times amended. The amendments, without exception, have tended to enlarge the liberties of the citizens of Puerto Rico and to recognize their right to participation in the processes of democratic government. In 1946, for the first time, a native of the island was appointed Governor; in the year 1948, "the body politic" known as the People of Puerto Rico, by authority of an Act of Congress—80th Congress, 1st Session, Aug. 5, 1947, Pub. 362—for the first time elected their own Governor. Thus, by a series of Acts, the Congress, for the people of the island, has underwritten the ancient liberties. A citizen of the United States carries with him his heritage of liberty wherever he may go within the country. Under our Constitution, the rights of persons and of citizens do not depend for enjoyment upon the accidental fact of whether one lives and does business on the mainland or on an island.

4. *The Liberty of a Man to, and Within, His Trade Is Among the Oldest and Best Established of Our Liberties; Its Protection Is Grounded Alike in the Common Law, in the Anti-Trust Acts and in the Due Process Clauses of the Constitution.*

The great ordinances of the Constitution, which recognize a province of civil liberties, are a heritage built up over the centuries. By these ordinances no person by the federal government may be deprived of life, liberty or property without due process of law. In a secure federal system, possessed of limited and delegated authority, the ancient liberties of persons are barricaded against the arbitrary use of political power. These safeguards are written in the terms, not of citizen, but of person. The word "person" is the broader, it comprehends alike the citizen and the alien. Here the guarantee is to the person, but the citizen who is a person cannot be put outside the orbit of the guarantee.

The freedom of a man to enter the trade of his choice, and within that trade to be secured in the exercise of his liberty, is numbered among the most ancient and best-established of our liberties. Under our legal system all trades are open to all who are able and willing to take their chances; all traders are free to conduct their own affairs as they please. The law accords to the trader, not a privilege, but an opportunity. The liberty of a man to, and within, his trade is limited by the liberty of all other men to, and within, the same trade. A man is at liberty to make deals, to seek new customers, to enlarge his facilities, to expand his business so far as his own initiative, energy and judgment will allow. The only proviso is that, in exercising his liberty along these lines, he must not encroach upon the similar liberty of others. The freedom of a man in his trade is subject to the ancient rule against restraint. The trade is to be kept open to all comers; all traders are to enjoy access to an

open market; in all that the trader does, he must carry on under competition.

The guarantee to a man of free access to his trade and to the open market in the sale of his goods is elementary in Anglo-American law. The common law prohibition against restraint of trade goes back to the days of the Year-books. The *Schoolmaster's Case*, Y. B. Hen. IV, p. 47, pl. 21 (1410); the *Meat Market Case*, Y. B. Hen. VI, p. 19, pl. 13; p. 25, pl. 2 (1483) and the *Dyer's Case*, Y. B. 2 Hen. V., p. 5, pl. 26 (1415). It was accorded standing and definitive statement in the days of the Tudors and the Stuarts. An *Anonymous Case*, Moore 115, 71 Eng. Rep. 477 (1576); the *Blacksmith's Case*, 3 Leon, 217, 74 Eng. Rep. 645 (1587); *Case of the Tailors of Ipswich*, 11 Coke 53a, 77 Eng. Rep. 1218 (K. B. 1614). The courts even refused to accept a royal grant of monopoly as a sanction for closing a trade against the newcomer, *Darcy* v. *Allen*, 11 Coke 84b, 77 Eng. Rep. 1260 (K. B. 1602). It played an important role in the movement to abate the royal prerogative, remove trade regulation from the King's pleasure, and make secure, against vested privilege, the liberties of subjects of the Crown. The Statute of Monopolies, 21 Jac. I, ch. 3 (1623-24) was not a new statute of the Realm; instead it was in form and effect a declaration of what the law had been since time immemorial. A man's right to his trade was inseparable from the hard-won liberties of the people.[40]

So great was the prestige of the rule that the Fifty-first Congress, after a protracted effort to frame its own anti-trust statute, fell back upon the common law and wrote the Sherman Act in the classic words of the rule against restraint. TNEC, Monograph No. 16, Antitrust in Action, Ch. 2, p. 8. Thus the common law rule was made applicable to commerce among the several states. As stated by Mr. Chief Justice Hughes, in *Appalachian Coals, Inc.*, v. *U. S.*, 288 U. S. 344, 359, 53 S. Ct. 471, "As a charter of

[40] The Petition of Rights and the Bill of Rights are to be found in any collection of documents upon the Constitutional History of England.

freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions." The Sherman law has not been treated by the courts as an ordinary Act of Congress. By its ban on restraint and its prohibition of monopoly, the liberty of a man in respect to his calling has been recognized as a principle basic to the operation of the industrial system. And because it fixes the general pattern of our national economy, the Sherman Act has been accorded the standing of a constitutional measure. *U. S.* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 60 S. Ct. 811; *U. S.* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 68 S. Ct. 915; *Federal Trade Commission* v. *The Cement Institute*, 333 U. S. 683, 68 S. Ct. 793. The right conferred by the patent grant, for instance, is severely limited by the anti-trust laws. *Carbice Corporation* v. *American Patents Development Co.*, 283 U. S. 420, 51 S. Ct. 496; *Morton Salt Co.* v. *G. S. Suppiger Co.*, 315 U. S. 788, 62 S. Ct. 402; and *Mercoid Corp.* v. *Mid-Continent Inv. Co. et al.*, 320 U. S. 661, 64 S. Ct. 268. Even where, as with the railroads, a system of regulation has been established to serve the public interest, the courts have been unwilling to permit persons who are carriers to surrender their liberty of action to a private authority which voluntarily they have set up. *U. S.* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 17 S. Ct. 540, and *State of Georgia* v. *Pennsylvania Railroad*, 324 U. S. 439, 65 S. Ct. 716.

The right of a man to, and within, his trade has in fact been lodged within the Constitution itself. The civil rights of persons are not limited to the liberties which may be safely indulged without fear of disturbing the prevailing political and economic order. [41] They include the liberties which are essential to the maintenance of the individual's opportunity. As long ago as the *Slaughter House Cases*,

[41] It is of note that, in respect to the general pattern and the operation of the national economy, the anti-trust acts play a role analogous to—in fact almost identical with—that which constitutional provisions play in respect to the general pattern and operation of the federal government. Nor are the blessings of liberty, domestic tranquility and the general welfare less dependent upon the national economy than upon the federal government.

16 Wall. 36, 21 L. Ed. 394, it was argued that the ancient liberty of a man to the free choice of, and freedom of action within, his trade was among the privileges and immunities of United States citizenship which no legislature in the Union could deny or abridge.[42] Although at the time the argument won the support of only four of the nine Justices, it would not down. It was presently repeated in a concurring opinion—*Butchers' Union Slaughter-House & Livestock Landing Co.* v. *Crescent City Livestock Landing & Slaughter-House Co.*, 111 U. S. 746, 4 S. Ct. 652. There Bradley, J., at p. 658, states: "I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States." And Field, J., at p. 660, has it that: "All grants of this kind are void at common law, because they destroy the freedom of trade, discourage labor and industry, restrain persons from getting an honest livelihood . . . " All this is now set down in the language, not of the privileges and immunities of the citizen, but of a liberty which can not be denied or abridged "without due process of law."

A little later the Supreme Court held that the exclusion of some persons from a trade which was open to other persons was a denial of the equal protection of the laws. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, a decision which has become established law—and which with some difference in attending circumstances—was recently repeated by the Supreme Court. *Torao Takahashi* v. *Fish and Game Commission*, 334 U. S. 410, 68 S. Ct. 1138. In time the right of a person in respect to his trade, in the language of "liberty of contract" came to be established as a constitution doctrine.[43]

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[42] The issue is fully explored in the briefs presented to this Court in behalf of the Butcher's Union by ex-Justice John A. Compbell in the Slaughter House cases. The challenged act was a legislative grant of monopoly, and Mr. Campbell was employing the Fourteenth Amendment as an anti-trust law.

[43] It serves little useful purpose here to pursue the old dispute as to whether a person's right to his trade is a "liberty" or a "property". It has been called both a liberty and a property. "The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful," quoted in *Mlle. Reif, Inc.* v. *Randau*, 166 Misc. 247, 1 N. Y. S. 2nd, 515 (1937); *Louis K. Liggett Co.* v. *Baldridge*, 278 U. S. 105, 49 S. Ct. 57 (1928). It is for the present purpose enough that since days of old it has legally been accounted a civil liberty.

Adams v. *Tanner*, 37 S. Ct. 662, 244 U. S. 590, and *New State Ice Co.* v. *Liebmann*, 285 U. S. 352, 52 S. Ct. 371.[44] In the famous case of *A. L. A. Schechter Poultry Corporation, et al.*, v. *United States*, 295 U. S. 495, 55 S. Ct. 837, the right of the various managerial groups—even when acting under the cloak of power delegated by the Congress—to establish codes and to set up authorities for the self-government of the several industries which make up the national economy was struck down as unconstitutional. An unanimous Supreme Court was unwilling to sanction an arrangement under which the liberties of members of a trade were put at the mercy of their competitors. No one among the ancient liberties which the due process clause seeks to secure is more firmly embedded in the fundamental law than the liberty of a person to and within his trade.

B. The Accused Section, in Violation of the Due Process Clause of the Fifth Amendment, Abridges the Civil Rights, Including the Ancient Liberty of the Trade, of Citizens of the United States Who Live and Work on an Island to the Benefit of Citizens of the United States Who Live and Work on the Mainland.

A careful analysis of the accused section,[45] against the background of the code for the regulation of industry shows that it has no lawful place in a comprehensive scheme for imposing order upon the sugar industry. Section 207(b) does not represent a valid exercise of the federal police power.[46]

[44] The dissents in these cases do not challenge the general principle of the liberty of the trader. Instead they are an insistence that a rightful regard for an outstanding public interest may make abridgement of this liberty a proper exercise of the public power and hence a satisfaction of the demands of due process. But no language in the dissents accepts, or suggests, a power in the legislature to depart from the rule of equality before the law.

[45] The accused Section 207(b) of the Act reads, "Not more than one hundred and twenty-six thousand and thirty-three short tons, raw value of the quota for Puerto Rico for any calendar year may be filled by direct consumption sugar" (7 U. S. C. A. § 1117).

[46] It was, in days before the elaboration of a comprehensive federal code of trade regulation, good usage to refer to "the police power" as belonging to the several states. And, in strict accuracy, the authority of the Congress to regulate stems from the several distinct powers granted to it, and each exercise has its specific justification. But so usual has become the regulation of trade regulation, good usage to refer to "the police power" as belonging to the federal jurisdiction is no longer taboo.

Our system of law knows nothing of the King's pleasure, the granting of special privilege, the vesting of a private interest, the use of the police power to confer a favor or to work a detriment. As our code has been elaborated to meet the needs of an increasingly complex society, the principle of equality before the law has been preserved. Where licenses, franchises and other grants have been given, they have been regarded, not as indulgences to favorites of the State, but as instruments of the general welfare. Where, amid the varied circumstances of a modern democracy persons have been too differently situated to be treated exactly alike, necessary departures from uniformity have had to stop short of playing favorites.

1. *The Liberty of the Person to and Within His Trade Can Be Denied or Abridged Only by Due Process of Law, That Is by the Exercise of the Police, or Regulatory Power to Serve a Public End.*

In accord with a legal system which plays no favorites, the economic liberty of the person is the general rule; the abridgement of the liberty the exception—justified only by service to a public purpose. A legislative departure from the ancient liberty to and within a trade is sanctioned only when the free and open market fails to secure industrial order. In such cases a restriction upon industrial opportunity may be needed to hold business activity to its appointed path. In all such cases regulatory safeguards are set up against the abuse of private power.

No single pattern, even that of the ancient and honorable competition system, will serve the needs of the distinct industries which make up a far from uniform national economy. It is fortunate, therefore, that in the police power the legislature possesses an instrument for making the needed adjustment.[47] But the police or policy power, that

[47] *Police Power*, 12 Encyclopedia of Social Sciences 190; *Munn v. People of Illinois*, 94 U. S. 113, 24 L. Ed. 77.

is, the general power of regulation, is an instrument of the general welfare, not of special privilege. While it is flexible enough to serve particular cases, its use must meet the demands of fair play. It is not to be employed as a means of favoritism or privilege. Its use by the legislature carries no authority to enrich, to vest with privilege, or even to confer opportunity upon certain members of an industry at the expense of their fellow members. On the statute books, federal and state, is a large and complex code of trade regulation. In all its multiple variety this legal code attests the fact that in the cases in which economic liberty has been abridged, the purpose has been to secure the ends which economic liberty is presumed to serve.[48]

Thus, in respect to the learned professions, where the trade is a "mystery" and the consumer is not a proper judge of the quality of the service, the state intervenes to insure competence. Standards of knowledge and skill are fixed for admission to the practice of law, medicine, dentistry and the like; and of late for admission to some less learned callings, such as that of the beautician, the realtor and the mortician. But the standards are fixed for all alike; and all who are licensed enjoy exactly the same rights within the profession and exactly the same liberty to compete for client or patient.

In recent decades the trend has been to convert an unregulated into a lawful competition. No longer is the operation of the industrial system left to a series of bargains among interested parties. As respects some aspects of business, the bargaining process has been brought under public control; other aspects of business have been withdrawn from it altogether. But, wherever the State has fixed standards for weights and measures, the purity and

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[48] A long catalogue of cases can be cited in support of the established place within our system of law of the liberty of the person to, and within, his trade. The following cases, taken from diverse jurisdictions, indicate the character of the rule. *Hubman* v. *State*, 33 S. W. 834, 61 Ark. 482; *Chicago* v. *Collins*, 51 N. E. 907, 175 Ill. 445; *Ex parte Pferrmann*, 66 P. 205, 134 Cal. 143. The rule almost meets the Roman standard for the law of that which is true *semper, ubique et ab omnibus*.

quality of the commodity, hours of labor, minimum wages, and the like, legislation has imposed its obligations with impartiality. If exceptions have been written to general laws, they have usually been to the benefit of under-privileged groups or of small business and because of a legislative recognition of the intensity of the struggle of such groups for survival. The great bulk of this legislation may be described as in the nature of setting rules for the competitive game. It neither grants to the privileged competitive advantage nor imposes upon the unfavored a competitive disadvantage.[49]

Even where by legislative act a measure of tolerance is accorded to action in concert, the ends of economic liberty are kept in mind. Thus, in statutes which provide for a resort to collective bargaining by labor, the objective is not to prohibit the free play of economic forces. It is rather to protect the unorganized against the tight and compact group with which it must deal; to promote fairer bargains by securing a better balance between the parties; to realize the very objectives the competitive system is designed to serve. The Wagner and kindred acts—29 U. S. C. §§ 151-166, July 5, 1935, c. 372, 49 Stat. 449; the Norris-LaGuardia Act, 29 U. S. C. §§ 101-115, March 23, 1932, c. 90, 47 Stat. 70—are predicated upon the propositions that in comparison with "capital", labor possesses inferior bargaining power and that legislation in redress of such inequality, in the words of Mr. Justice Holmes, is intended "to establish that equality of position in which freedom of contract begins".[50] Dissenting opinion in *Coppage* v. *Kansas*, 236 U.S.

[49] *U. S.* v. *Seventy-five Boxes of Alleged Pepper*, 198 F. 934; *Bumpus* v. *Continental Baking Co.*, 124 F. (2d) 549; *U. S.* v. *Darby*, 312 U. S. 100, 61 S. Ct. 451; *Champion* v. *Ames*, 188 U. S. 321, 23 S. Ct. 221; *Hipolite Egg Co.* v. *U. S.*, 220 U. S. 45, 31 S. Ct. 364; *U. S.* v. *Carolene Products*, 304 U. S. 144, 58 S. Ct. 778; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 57 S. Ct. 578; *Carmichael* v. *Southern Coal and Coke Co.*, 301 U. S. 495, 57 S. Ct. 868; *Chas. C. Steward Mach. Co.* v. *Davis*, 301 U. S. 548, 57 S. Ct. 883.

[50] The courts, of course, possess no facilities for weighing the unbalance. In oft-repeated words Mr. Justice Holmes has insisted that the test is the reasonable belief of the legislature. As that belief has changed—and still remains reasonable—the legislation is, within the bounds of due process, subject to correction. Thus at a later date the Congress, viewing the unbalance differently or deciding that in recent years it had been at least partially corrected, passed the Taft-Hartley Act, (29 U. S. C. A., 141 et seq., 61 Stat. 136).

1, 35 S. Ct. 240. To the same effect the idea that the farmer is in an inferior bargaining position in the sale of his crops finds expression alike in judicial utterance and in Acts of the Congress granting to him a qualified exemption from the antitrust laws. Capper-Volstead Act, 7 U. S. C. §§ 291-292; 42 Stat. 388; Cooperative Marketing Act, 7 U. S. C. §§ 451, 457; 44 Stat. 802, 803; Fisheries Cooperative Marketing Act, 15 U. S. C. §§ 521, 522; 48 Stat. 1213, 1214; Agricultural Marketing Agreement Act of 1937, 7 U. S. C. §§ 608b, 608d; 48 Stat. 31, 49 Stat. 753, 761, 50 Stat. 246; Packers and Stockyard Act, 7 U. S. C. §§ 192, 225; 42 Stat. 161, 168; Communications Act of 1934, 47 U. S. C. § 222(b)-(f), 57 Stat. 6; and Civil Aeronautics Act of 1938, 49 U. S. C. 488; 52 Stat. 1001. All such statutes are alike in making provision for a properly qualified government official or agency to take action if there is reason to believe that the tolerance is being abused or that the beneficiaries of the legislation had moved from an inferior to a superior bargaining position.[51] The rationale in all such measures is to employ legislation to correct an unbalance, and to put members of a group in position to make effective their economic liberty.

But our national economy, far from uniform in character, is a huge and complex affair. It is made up of a host of industries which differ in structure, in technology, in pattern of trade practices, in the places which they occupy within it. Because of this variety the free and open market can operate only with varying degrees of perfection. If under the rule against restraint an industry operates without notorious evils the disposition alike of the legislature and the judiciary is to leave it alone. It is only when industrial disorder has brought substantial harm, when competition has failed its regulatory office, and when disorder

[51] For example, the second section of the Capper-Volstead Act, 7 U. S. C. A. 292, 42 Stat. 388, reads:

"If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, . . . "

has become notorious that the legislature seeks to abate the liberty of a trade. The examples of such governmental interference fall into two general classes—namely to insure to the public relief from under-competition and to hedge a group dependent upon a single industry for its livelihood against the destructive impact of an overdose of competition.

The dominant—almost the exclusive—examples of legislative relief for the public against undercompetition are the so-called public utilities.[52] In respect to the railroad, the telephone, power and light, the street railway, investment is heavy, the ratio of fixed cost to out-of-pocket expense is high, duplication of plant and service is needless. To open such an industry to all comers is nothing short of a public extravagance—and often, as with the telephone, a positive nuisance. But in all such cases, the hazards of the closed door have been recognized; and upon a regulatory agency, usually set up as a commission, is imposed the task of securing to the public the protection which competition is presumed to effect. It is the duty of this authority to see to it that service is adequate and regular; that performance is kept up and price down; that strategic position is not capitalized into excess profits.

But difficulties attend the attempt of any regulatory authority to take over the role of the market; and, even in the face of regulation, the courts have been reluctant to relax completely the safeguards of the system of economic liberty. Shortly after the turn of the century the Supreme Court, in spite of the Interstate Commerce Act of 1887, recognized a place for competition in the operation of the railroads—*U. S.* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 17 S. Ct. 540—and only a short time ago, in spite of an elaborate code for the regulation of the railroads which has been built up over the years—Transportation Act as amended, 49 U. S. C., especially §§ 3, 15, 30, 33, 73, 74, 102—the Court found itself unwilling to accord to the Eastern

[52] It is of note that at first "public utility" was a name for the end, not for the instrument. The railroad, the waterworks, the street-railway were said to serve "the public utility".

and Southern railroads immunity to the anti-trust laws. *State of Georgia* v. *Pennsylvania Railroad, et al.*, 324 U. S. 439, 65 S. Ct. 716. And, in respect to power and light, the failure of regulation as an instrument of control has led to a revival in a modern form of the older rule; and in its "yardstick" the Tennessee Valley Authority has forged a competitive weapon for keeping service up and rates down. *Ashwander* v. *T. V. A.*, 297 U. S. 288, 56 S. Ct. 466; *Tennessee Electric Power Co.*, v. *Tennessee Valley Authority*, 306 U. S. 118, 59 S. Ct. 366.

The principal—almost the exclusive—example of legislative relief from over-competition is to be found in the agricultural and extractive industries. In the production of such staples as corn, milk, wheat, cotton, and tobacco a multitude of farmers and of farm laborers are engaged. These persons, who take their living from the soil, constitute a substantial interest within the commonwealth, the maintenance of whose purchasing power is essential to the operation of the national economy. In respect to each staple crop, our capacity to produce, augmented as it is by the progress of the agricultural arts, is vastly in excess of what the market—at prices which will give to the farmer a decent standard of life—can absorb. Yet, barring the intervention of the government, there are no effective techniques for adjusting an over-done and fluctuating supply to a fairly constant demand. Even if it was lawful for them to do so, the innumerable producers of oats or peanuts or potatoes could not get together, work out a voluntary system of restriction, allocate the agreed-upon acreage among themselves, and police against rebellious members, the indignant public, and the state, the decrees of their own private government. Long experience with all of these staples has demonstrated the incapacity of the free and open market to effect the adjustment. Here, as with other commodities, low or high price may be a signal to increase or to decrease production. But, if the market is to perform its function, the response to the price-signal must be approximately

exact, not too much or too little. Among a multitude of farmers, each acting for himself, not even an approach to the necessary precision is possible.[53] The matter is made the more difficult by the one-crop system. Whatever the crop, there is always a stubborn minority—enough to keep the open market from doing its work—which insisfs upon its own way. In the staple crops, unlike processing and manufacture, price cannot be made to serve as a guide to production. The government is invoked to do what the market, responding to a multitude of separate judgments, cannot do for itself.[54]

The classic cases on the validity of legislation designed to shield exposed groups from the impact of an overdone competition are *Nebbia* v. *New York*, 291 U. S. 502, 54 S. Ct. 505, and *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 56 S. Ct. 855.[55] In the *Nebbia* case the issue was the validity of a state statute designed to stabilize the industry by putting

[53] The matter stands out sharply in the concrete instance. Let us assume a bumper crop and a low price for cotton. Farmer A decides that at such a low price cotton does not pay; next year he will put his ground to cowpeas. Farmer B says to himself, "What Farmer A does, other farmers will do. With so much acreage withheld, there will be a short crop next year; so I'll put all my acres in cotton and make a killing." Farmer C solliloquizes, "Most farmers are about as smart as Farmer B and no smarter. They expect to clean up on the restraint of their neighbors. Too many persons are out for a killing. Next year's price will make this year's look high. So I'm laying off on cotton." What comes about depends upon how many Farmers A, Farmers B and Farmers C there are. See Robert H. Montgomery, The Cooperative Pattern in Cotton.

[54] An article in 4 Encyclopedia of Social Sciences, 438 *supra* ,by Mordecai Ezekiel; briefs for the U. S. in *U. S.* v. *Butler*, 297 U. S. 1, 56 S. Ct. 312 *supra*, brief of the U. S. in *Mulford* v. *Smith*, 307 U. S. 38, 59 S. Ct. 648. The argument for the incapacity of the free and open market to effect the adjustment is not disputed by Mr. Justice Roberts who spoke for the court in the *Butler* case. It is significant that he found the opposition of a pattern of control essential to banish chaos from the industry to lie outside the powers delegated to the Congress by the Constitution, even in the disorderly agricultural industrials committed to the production of staple crops. It was not until some years later, in *Mulford* v. *Smith*, *supra*, where the Act as rewritten to substitute marketing for production quotas was before the Court, that he made an admission of the limited constitutional power to employ legislation to meet the situation.

[55] The two cases are leading in distinct and even contrasting ways, the *Nebbia* case for its holding, the *Carter* case for its record. The *Nebbia* case recognized for the first time the power of the legislature to exercise control over price in a competitive industry. In the *Carter* case, the United States built up an elaborate record demonstrating the incapacity of the free and open market to abate the plight of bituminous coal, with its roots in over-capacity.

a floor under milk prices. There the police power of the state was in direct opposition to liberty of contract. Representing a minority of four, Mr. Justice McReynolds stood staunchly for the ancient liberties and for leaving regulations to the market. For the majority of five, Mr. Justice Roberts said in effect that the state had the power to lend a hand to help competition over the hard places. In the *Carter* case the issue was the validity of a federal statute designed to lessen, if not to end, the notorious plight of the soft coal industry. The issue of due process, although stubbornly argued, received little formal consideration in the opinion. Instead the majority of the Court, by Mr. Justice Sutherland, struck down the labor controls in the Act as applying to matters within the province of the several states and beyond the reach of the Congress. And, since for the Court he preferred to sever the price from the labor provisions[56], the whole act fell.[57] In dissent Mr. Justice Cardozo recites the notorious case of bituminous coal and argues the incapacity of the market to bring order to the industry.[58]. Although Mr. Justice Cardozo's discussion is addressed to an extractive industry, the analysis neatly fits the case of the staple crops. For under our legal system, the first reliance is upon liberty of contract; and in cases where the open market fails in its function, the state with appropriate measures may come to the rescue.[59]

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[56] The legislative power over price was established in the *Nebbia* case. Accordingly there is by the court no declaration of the invalidity of the price provisions as such. They fall only because they cannot be severed from the labor provisions. Mr. Justice Roberts does not dispute the fact that the plight of bituminous coal, like that of milk, creates a "felt need for legislative relief".

[57] Wagner Act cited *supra* has been found to be constitutional, *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; 57 S. Ct. 615.

[58] A new bituminous coal act was passed by Congress, drafted to take account of Mr. Justice Sutherland's opinion and was in *Sunshine Anthracite Co.* v. *Adkins*, 310 U. S. 381, 60 S. Ct. 907, found to be valid. The ruling in respect to labor controls has long since ceased to be law.

[59] It was contended in *Wilson* v. *New*, 243 U. S. 332, 37 S. Ct. 298, that the Constitution required the fixing of the hours and the wages of railroad employees to be left to liberty of contract. For the Supreme Court, Mr. Chief Justice White argued that in the case before it liberty of contract had already had its chance and that in the face of its failure the state was not left helpless. The opinion is alike a statement of the rationale of liberty of contract and a definition of the type of circumstance which warrants legislative departure from the general rule.

In the *Nebbia* case Mr. Justice Roberts is quite correct in saying that "the Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases." As the argument above has shown, the state may interpose its authority to assure a minimum of competition, to establish fair rules for the competitive game, to secure to the consumer high quality and reasonable price, to put a floor under an industry run wild, to rob an acknowledged monopoly of its exploitative power, or to shield a substantial group from the impact of the price fixed by a market out of hand. But all such interferences are expressions of policy designed to serve a public purpose. Together they mark out the lawful limits of the province of government. They give no warrant for the Congress to dispense its favors at its legislative pleasure. The proper office of public control is to attain the ends which a functionless competition fails to secure.

2. *Raw Sugar, Under the Operation of the Free and Open Market, Proved to Be An Industry in Distress and the Congress Was Within Its Powers in Using Legislation, with Fairness to All Interests, to Abate the Disorder Attending Its Production.*

The case of raw sugar meets squarely the rationale of resort to regulation to lessen or put an end to industrial disorder. The experience of decades bears testimony to the inability of the free and open market to impose order upon the production of sugar. It presents overwhelming evidence to the incidence of disorder in economic insecurity for all concerned, a perennial disparity between price and cost of production, the denial to workers of an opportunity to obtain and make secure a decent standard of life. Sugar is a subtropical crop, and wherever it is grown, nature is insistent. The beet and cane regions of the United States fall far short of the continental demand. And if the domestic territories off-shore, Hawaii, Puerto Rico and the Virgin Islands, are added, the supply is still inadequate. The Republic of the

Philippine Islands cannot fill the deficit; and Cuba, an island under a foreign flag, is called upon to fill out the needed supply. Cuba alone could do more than meet our mainland requirements. So long as there were no trade barriers, our continental markets were targets for sugar imports from all over the world. The market did not "tend to break"; it was always broken; and the mechanisms by which price is made to cover costs of production refused to perform. As a result an approximation of price to cost was achieved largely by taking the deficit out of the meager wages of the worker in the cane fields. Instead of the fair bargain the market is supposed to achieve, the consumer came to be subsidized by the sugar planter and his laborers. The disorder found a continuing incidence in a supply which outran demand, in a plague of bankruptcies, in a vain struggle of workers to achieve decency. The members of the industry were scattered across the globe; differences in cultures, ways of thought, and speech forbade an united attack upon a common problem; there could be no concerted action to impose a pattern upon, or to restore health, to the industry. The only alternative to chaos was governmental action.

It is to the elimination of the evils of a functionless competition that the Sugar Act in its several versions—the Jones-Costigan Act, the Act of 1937, the Act of 1948—is directed. It isolates an area consisting of the Continental United States, the Republic of the Philippine Islands, the Virgin Islands, Puerto Rico, Hawaii and Cuba from the world market. It imposes upon the marketing of raw sugar an elaborate pattern of control. It puts the public interest to the front by directing the Secretary of Agriculture, as a predicate to the whole system of regulation, annually to estimate the total demand for sugar by the people and the industries of the Continental United States.[60] (Act, Section 201.)[61]. It then directs the Secretary, under instructions

[60] It is of note that as here used in the Act "demand" is not demand at a fixed price. At the very low price at which sugar is sold, even under the scheme of regulation, demand is fairly constant.

[61] Act, Section 201, Appendix C, pp. 128-129, below.

designed to insure that it is "fair, efficient and equitable," to establish quotas for each of the several territories, both mainland and offshore, from which the Continental United States receives its sugar.[62] Specific quotas are assigned to the beet and cane regions on the mainland, to the domestic off-shore territories, to the Republic of the Philippine Islands, and to foreign countries. All save 1.36% of the so-called foreign allotment goes to Cuba; and as estimated continental demand rises or falls, its quota—which is the chief element of flexibility in the scheme—is increased or diminished. Provision is also made for transferring parts of the quota from American territories which can not fill them to other American territories which can make up the deficit. In effect the Act lifts the area specified out of the world market on to a "plateau" and there insulates it against the impact of untamed economic forces. By fencing off excess capacity and by equating supply to demand, the Act seeks to secure for the industry the order and the balance of interests which it is the very purpose of the open market to effect.

The administrative process may not be the ideal instrument for such a task—but it has flexibility, lends itself to trial and error, and allows correction of flagrant mistakes. And, to insure that quotas meet the tests of fairness, economy and equity specified by the Congress, access to the courts is left open to all interested parties there to seek review of the orders of the Secretary.[63] Here regulation has been invoked to protect the host of helpless people engaged in the production of raw sugar against the impact of a needless disorder. The case of raw sugar falls squarely within the rationale of the use of the police power to abridge liberty of contract.[64]

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[62] Act, Section 202, 204, Appendix C, pp. 129-131, below.

[63] Section 205(b) and (d) of the Act, Appendix C, pp. 132, 133.

[64] In the international field, where the source of supply is in one country or countries, and the principal consumers in another country or countries, the same rationale supports resort to regulation, often by international agreement, of staple crops or in extractive industries. The dominant examples are coffee, rubber, mercury, and tin.

3. *The Accused Section Is Not an Integral Part of the Sugar Act, Draws No Support from the Rationale Which Sustains That Act, and Lacks Justification as An Exception to the General Rule of a Person's Liberty to and within His Trade.*

It is freely admitted by the Government of Puerto Rico that, as respects raw sugar, the Congress was within its power in passing the Act. Moreover, it is at least possible to hypothecate—even though it may be impossible to find—a situation which would justify the Congress in setting up a non-discriminatory system for refined sugar. But the point is that, in respect to refined, such a situation does not exist, the legislative rationale which justifies the control of raw does not carry over, and the Congress in fact has established no such system of quotas. Here the circumstances which would warrant resort to the police power do not exist. Section 207(b) is not in intent, character, or content a system of regulation for refined sugar.

The portions of the Act concerned with raw sugar are an entity. They constitute a complete scheme for the allocation among the named political units of the sugar to be marketed and consumed within the Continental United States. No provision in respect to refined sugar is necessary either to round out this system or to implement it. The reasons which make necessary a scheme of control for raw sugar do not even suggest the regulation of refined. In the system of allocation for raw, the total amount to be marketed has already been adjusted to consumption needs. Since demand and supply have been equalized, the situation is quite ideal for the operation of competitive forces. There is no need for further regulation to supplant or to supplement the open market. The excess capacity which with insistent drive is forever disorganizing the market has been hedged off by the controls imposed upon raw sugar. This excess capacity cannot break through that barrier to wreck the market for refined. So long as the supply of raw

sugar is limited, an excess in refining capacity—however inconvenient to the coast refiners—cannot generate an excess supply of refined,[65] which can break, disturb or even affect price.[66]

Nor is a system of quotas for refined necessary as an instrument of industrial stability. The refingrs are a small, compact, highly organized group, not like the growers so numerous and widely scattered as to be incapable of concerted action. No government interference is necessary to lift them to "that equality of position in which freedom of contract begins." Instead their small numbers threaten rather a unity in action and a relaxation by mutual consent of the severities of competition—an indulgence in unlawful behavior of which in the past they cannot be said to have been entirely innocent.[67] Here it is of note that, although an allocation of the 126,033 tons of refined allowed to Puerto Rico is annually decreed by the Secretary, no allocation in respect to the more than four million tons reserved to the coast refiners has ever been made. Such prorations are decreed when "necessary to assure an orderly or adequate flow" or "to prevent disorderly marketing".[68] The clear inference is that, whereas competition holds sway among the insular refiners, the coast refiners—without benefit of any Secretary's mandate—are quite able to maintain orderly marketing. Even if the items of Section 207 were rounded

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[65] It was in the Court below argued by the coast refiners that the accused section is justified as a remedy for the excess capacity in the refining branch of the industry. No case was cited—and the Government of Puerto Rico has found none—in which the relief of excess capacity in a processing or manufacturing industry has been held to be a proper exercise of the police power. If there were such a legislative power, the refining branch of the sugar industry would be one of the least appropriate fields for its exercise. For the number of the members of the industry is small; the total number of tons annually to be refined is fixed; and refining presents one of the easiest of situations in which capacity for mainland consumption can be brought into line with demand. But even if legislative power could lawfully be used for such a purpose, the section would still stand condemned. For it does nothing to relieve excess capacity of refiners operating in Puerto Rico and upon the island it arrests the growth of a natural industry.

[66] In fact here the threat to the public is quite the reverse. The refiners, having only a fixed amount of raw to process, may curtail operations or withhold supply to drive price up.

[67] *Sugar Institute* v. *U. S.*, 297 U. S. 553, 56 S. Ct. 629.

[68] Section 205(a) of the Act. Appendix C, p. 132, below.

out into a complete system of allocation for refined sugar, it would find no support in the rationale which sustains the raw sugar provisions of the Act.

But the Congress has not imposed—it has not attempted to impose—a system of allocation upon refined sugar.[69] All that Section 207 does is rigidly to limit the proportions of the quotas assigned to Cuba, Hawaii, Puerto Rico, the Virgin Islands and the Republic of the Philippine Islands which may be filled with refined sugar. It can not be contended that the accused section constitutes a scheme of allocation for refined. To reach such a conclusion one must subtract the sum of the off-shore maxima for refined from the total amount which is to be marketed within the Continental United States. The arithmetic may be valid; but such an exercise does not reveal a system of allocation. The remainder so found is not by Congress broken down between the beet and the cane areas on the mainland or between the Gulf, Atlantic and Pacific Refineries. In downright fact, no market quota of refined sugar is assigned to Puerto Rico or to any other off-shore territory. The figures given—126,033 short tons for Puerto Rico—are not quotas, but maximum limitations upon the amounts which Puerto Rico and the others are permitted to market upon the mainland. Puerto Rico may fall far short of this figure; it may market no refined sugar whatsoever upon the continent; but it must not exceed this figure. Nor are the coast refiners limited to the total number of tons needed for consumption within the Continental United States minus the sum of so-called allocations to off-shore refiners. They may

[69] The holding in *Gay Union Corporation, Inc. v. Wallace*, 112 F. (2d) 192, gives no support to the contention that the Act sets up a quota system for refining. In this case the plaintiff, a continental refiner, insisting that without the security which a quota would offer, he could not afford to engage in the business, demanded an order to the Secretary compelling the assignment of a quota to him. He wished to escape the competitive struggle and to be vested with an equity in the market; by Judge Vinson, speaking for the Court of Appeals of the District of Columbia, his prayer was denied. The separation of the raw from the refined provisions of the Act was not before it; and accordingly the court made no ruling upon such a discrimination as is presented by Section 207(b). It merely treated the Act as valid, as a regulation of the continental market.

compete for the business of processing every ton of raw sugar which may lawfully be brought to the mainland.

What in fact Section 207 does is to set up competitive zones. Thus the coast refiners may compete for the business of refining every ton of sugar which lawfully may be marketed within the continental United States, whether it be produced on the mainland or off-shore. But the refiners in the several off-shore territories are not allowed to compete for the business of refining sugar grown on the mainland. Nor can they compete for more than a fraction of the business of refining the sugar grown within their respective territories. The Puerto Rican refiners not only have to surrender more than five-sixths of the sugar grown on the island, but also in respect to the less than one-sixth left, they have to compete for the business with the coast refiners. Imagination cannot pick out the outlines of a quota system in so discriminatory an arrangement.

In behalf of the accused section, two contentions may be put forward, neither of which will bear scrutiny. The first rests upon the premise that the maxima assigned to off-shore territories are market quotas. This premise, resting upon sheer assumption, finds no support in fact or analysis. It may well be that Puerto Rico markets on the mainland the maximum amount permitted. If so, this is only because its refiners—made alert by having to compete—have been able to take the maximum business they are allowed away from the coast refiners. It may even happen that, once the legislation barrier set against them is removed, the insular refiners will be able to capture a part of the insular production now processed by the coast refiners. If so, the result will come, not by vesting the insular refiners with a privilege, but only because through greater efficiency they were able to capture the business in the good old American way.

It might even come about, as a result of the removal of the restriction, that a part—even the major part—of the business of refining Puerto Rican tonnage would be trans-

ferred from mainland to off shore. Such a shift in industrial base is in accord with all our traditions and is not to be viewed with alarm. Ours is a highly dynamic economy; the progress of the useful arts constantly creates new opportunities. Our industrial system must be kept mobile enough to seize these opportunities. Particular industries are to be carried on where conditions are most favorable to efficiency and low prices are to be found. It is mobility, directed by competition towards the new and greater chance which is the first law of industrial growth.

The second contention, likewise resting upon an infirm foundation, is that the system of allocation—which does not exist—is fair. Thus it is argued that the 126,033 short tons imposed as a limit represents the maximum number of tons marketed on the mainland by Puerto Rican refiners in any year before a regulatory system was imposed upon raw sugar. It may be asserted that it is just and right to say to Puerto Rico, "In the years before the Jones-Costigan Act was passed, you were free to refine as much sugar as you could secure. In those days no legislative mandate abridged or denied the ancient liberty of that trade. It is true that in 1936, that liberty was curtailed—but that had to do only with the opportunity to expand the business. The abridgement of an established civil right was not made retroactive. You are now allowed to market on the mainland the maximum the infant industry had marketed there when the trade was stabilized—that is, if you can hold the business against the competition of the coast refiners. So, as of the year 1937 your right to refine is frozen."

4. *The General Rule of Uniformity Can Not Be Strictly Applied Amid the Diversity of Our Industrial System; But in Departures From It the Congress Is Endowed With No Authority to Discriminate Between Groups of Citizens, or to Dispense Its Favors and Penalties at Its Pleasure.*

In spite of—or perhaps because of—its *ad-hoc* approach,

this Court has rather consistently recognized the complexity and diversity of the national economy. It has noted that whereas one industry might safely be left to the market, there was a "felt need" for regulation in respect to another. It has also observed that because of differences in structure, the patterns of trade practice, the rapid or slow advance of technology, the distinct offices to be performed, a single strait-jacket of public control could not be imposed upon all regulated industries. It likewise has been quick to discover that an industry contains unlike business units which operate under varied conditions, and that any legislative design—without a sacrifice of fundamental fairness—must be flexible in its application and capable of accommodation to distinct situations.[70]

The flexibility of industrial equality before the law has often been stated by this Court. And just as often the limits within which the legislature may depart from the rule of uniformity have been made clear. The leading case in this domain is *Nebbia* v. *New York*, 291 U. S. 502, 54 S. Ct. 505. There the Court held that " . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare. . . . The courts are without power either to declare such policy, or when it is declared by the legislature, to overrule it". (*Ibid.* 537.) The ruling thus stated is self-limiting. It is a policy, not a discriminatory scheme, which the legislature is free to adopt; its proper objective is not privilege, but the "public welfare"; its instruments must be "reasonably" adapted to serve the chosen ends. But such indulgence is in no sense a waiver of fundamentals. For the due process clause demands that "the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." (*Ibid.* 525.)

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[70] " . . . a regulation valid for one sort of business, or in given circumstances may be invalid for another sort, or for the same business under other circumstances, because the reasonableness . . . of each regulation depends on the relevant facts." *Nebbia* v. *People of New York*, 291 U. S. 502, 525, 54 S. Ct. 505, 511.

The rule of uniformity—and lawful departure therefrom—was thoroughly considered in the decision upon the validity of the Tobacco Inspection Act, *Currin* v. *Wallace*, 306 U. S. 1, 59 S. Ct. 379. There, the contention for the invalidity of the statute was, according to the Court, a "mere lack of uniformity in the exercise of the commerce power." To this contention the reply was that "the Congress may exercise its discretion in the use of the power" and "may choose the commodities and places to which its regulations apply." (*Ibid.* 14.) But the Court was careful to point out that the very statute which "defines the policy of Congress . . . establishes standards within the framework of which the administrative agent is to supply the details." It is true, as the Court remarked, that "the making of uniform rules would impose a limitation which the Constitution does not prescribe." But note that the departure from uniformity is to be tolerated on the level of "rules", not of intent or policy; and that, if Section 207(b) is severable from the Sugar Act, the condemnation of "contesting a regulation" has no application and Mr. Chief Justice Hughes, speaking for the Court, readily admits that "there might be discrimination of such an injurious character as to bring into operation the due process clause of the Fifth Amendment" (*Ibid.* 14).[71]

It is, however, in *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251, 56 S. Ct. 453, that the issue is put beyond peradventure. There the Court was confronted with a legislative mandate, putting a floor under the retail price of milk and permitting independents to sell at one cent less than the minimum price. Upon the validity of the excep-

[71] Nor does *Wickard* v. *Filburn*, 317 U. S. 111, 63 S. Ct. 82, give support to a power in Congress to enact such a measure as Section 207(b). That case had to do with the challenge of the second Agricultural Adjustment Act as it related to the production of wheat. This Act, setting the pattern of control for the staples, is a regulation of the market for the raw, not the processed, commodity. The function of the processor in the operation of the Act is purely instrumental. Mr. Justice Jackson points out, a proposition not to be disputed, that in operation the Act may fail to do justice in the individual instance. But this is not to be read as a sanction for arbitrary inequalities between similarly situated groups in the same industry.

tion, the justices divided five to four. Mr. Justice McReynolds, for the minority, was of opinion that the lower price allowed the small companies was a discrimination without warrant in the law. Mr. Justice Roberts for the majority, held that the one-cent differential was essential to compensate for the advantage which the big companies enjoyed in the consumer acceptance accorded to advertised brands. Thus the issue upon which the Court divided was a question of fact—whether or not the one-cent differential was a special privilege. The majority was as insistent as the minority that a departure from uniformity, induced by practical reasons, must stop short of discrimination. The answer is the more certain, since the one-cent differential had been established "by the laws of trade or industry", and the legislature took care not to upset a natural balance.[72] In a word the very purpose of "the expediency" was that of "attaining equality of opportunity" between the two competing groups.

The accused section of the Act stands condemned by these and other authorities. It is not justified as an attempt either to maintain a balance which a functional competition had established, or to correct an unbalance brought into being by a functionless competition. It is not an accommodation of general standards to the varied detail of an industry in operation. Its departure from the constitutional guarantee of equal protection transcends mere lack of uniformity and becomes downright discrimination. It has in no way been shown to serve a public purpose. To sanction the accused section would be to go far beyond any tolerance which heretofore this Court has been willing to accord to an arbitrary act of the Congress.

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[72] "There was a plain reason for the classification . . . it was that there had resulted a balance between that advantage and the resulting disadvantage to the unadvertised dealer, a balance maintained by a price differential. To attempt to maintain that balance was to strive for equality of treatment, equality of burden, not to create inequality . . . Where, as here, there is recognition of an existing status and an attempt to equate the incidence of the statute in accordance with it, we find a compliance with, rather than a disregard of, the constitutional guarantee of equal protection." *Nebbia* v. *New York*, 291 U. S. 502, 54 S. Ct. 505.

5. *The Real Purpose of the Accused Section, Unauthorized by the Constitution, Is to Confer a Privilege Upon the Coast Refiners at the Expense of the Refiners of Puerto Rico.*

The system of allocation for refined sugar cannot be fair, when there is no system of allocation. It cannot accord equity to Puerto Rico when it arrests the growth of a natural and important industry. The provision in question cannot be justified as an expression of public policy. In no wise does it serve the consumer. The taste, quality, composition, specific gravity, adaptation to use, is in no way affected by the place of processing. No interest of the consumer is involved. Nor can an argument in respect to volume of employment be held to be in point. Section 207 (b) does not and in itself cannot be made either to increase or to decrease the number of laborers gainfully employed in refining. If, as may be insisted, it secures employment to mainland workers, it denies an equal volume of employment to insular workers. Given the state of the art, the total demand for labor remains the same. Nor as between island and continent, is it possible to argue that the provision creates a new channel for capital. It is impossible to invoke the public interest in support of the accused provision.

In fact the accused section is exactly what it professes to be—a legislative mandate abridging the business opportunities of Puerto Rican refiners to grant market rights to the mainland refiners. It is a bald attempt to employ legislation to arrest a competitive struggle in order that benefits may be conferred upon favored persons. It is a vesting of the continental refiners with the exclusive right of refining all the sugar marketed in the continental United States except for small doles for which overseas territories are permitted to compete. Section 207, in violation alike of our code of law and of our system of free enterprise, attempts to establish an arbitrary pattern of property rights in the

market. A small equity in the mainland market is granted to each off-shore territory—that is, if it can win and hold it. A property right in the rest of the market is accorded to the coast refiners—without any necessity on their part to win or to hold it. In respect to raw sugar, where regulation is necessary, the law prescribes a mechanism for the periodical adjustment of quotas to changing circumstances. In respect to refined, where no case exists for regulation, the market maxima set against off-shore territories are fixed against the impact of change, enterprise and progress.

It is of note that by the Congress no such penalty as that sanctioned by Section 207(b) has ever been imposed upon the economy of a state. The invitation to such an imposition is great and continuous. Textile mills are set up in the State of Georgia; is the Congress to be invoked to arrest the infant industry in order that New England operators may be guaranteed the markets which they have enjoyed in the past? In the State of Illinois, a couple of automobile factories spring up. Is national legislation to be invoked to make sure that the market provinces of three big Michigan corporations are not disturbed? The State of Pennsylvania once boasted a great petroleum industry. If the Congress could have been persuaded, would it have been lawful to use a national mandate to prevent Texas wells from "coming in"? Such laws are as unlikely and as unprecedented as they are unauthorized by the Constitution. Yet, the Congress, by arbitrary fiat has abridged the liberty of persons engaged in the trade of sugar refining who happen to carry on their business in Puerto Rico. And, the Congress, by the same arbitrary legislative fiat, has vested with a special privilege persons in the sugar refining trade who do business on the mainland.

In the Constitution of the United States there is no provision for a first and for a second-class citizenship. Like the people of Georgia, Illinois and Texas, the citizens of Puerto Rico are citizens of the United States. The Organic Act contains its bill of rights; and by an amendment there-

to—80th Cong., 1st Sess., Aug. 5, 1947, Pub. 362—they are endowed with all the rights and privileges, all the liberties and immunities of citizens of the several states. Yet the Congress has abridged the liberty of the trade of United States citizens living in Puerto Rico solely to confer a benefit upon citizens carrying on their business on the mainland.

C. The Accused Section of the Act Derives No Sanction, Justification or Excuse From the Power Conferred Upon the Congress to Regulate the Territories.

In an attempt to avoid the demand for equality before the law, the proponents of the accused section seek to shift the battle front. It was argued below—and doubtless will be contended here—that in respect to Puerto Rico a power inheres in the Congress which does not obtain in respect to a state of the Union. Accordingly they point to "the territory clause" and insist that, in respect to its orbit this clause endows the Congress with "plenary power".[73]

To make such a shift is to misstate the issue. In no wise is the accused section—or even the Act—a rule or regulation for the territory of Puerto Rico. In no way is the government of Puerto Rico, its various agencies and corporations, or its officials involved in the administration of its provisions. The statute upon which it is grafted is entitled "an Act to regulate commerce among the several states, with the Territories and possessions of the United States and with foreign countries [74] . . . and for other purposes". The Act in general is a prescription of the conditions under which sugar may be marketed within the con-

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[73] A plenary power is one which may be exercised to the full extent or in its plenitude. It is not an absolute, unlimited or irresponsible power. To call a power plenary is not to define its content or to mark out its limits. See any standard secular or legal dictionary.

[74] The title or preamble continues, ". . . to promote the welfare of consumers of sugars and of those engaged in the domestic sugar producing industry, to promote the export trade of the United States, and for other purposes." Note the choice of the term "sugar producing industry"—not producing and processing, indicating that the Act is a farm relief measure. Note also that, inasmuch as they are beneficiaries of the Act as regulating the production of raw sugar, Hawaii and Puerto Rico are here accounted "domestic".

tinental United States and a specification of the amounts which the several sugar-producing areas—mainland and off-shore—may market.

As a regulation of commerce, both the Act and the accused section invite scrutiny. The entrance of sugar from the cane lands and beet fields on the mainland into the continental market clearly involves "commerce among the several states". The flow of sugar from Cuba—and now from the Philippine Islands—is just as clearly within foreign commerce. The movement from the Virgin Islands is from a possession of the United States. The streams from Hawaii and Puerto Rico to the mainland are, in the words of the title of the Act, "commerce . . . with the Territories of the United States." It has been held—the ruling was limited to the Philippines before independence was fully effected—that there could be imports into the United States whose point of origin was not a foreign country.[75] But as between "foreign commerce" and "commerce among the several states," the Constitution recognizes no intermediate category. Accordingly it is not enough for the champions of the accused section to invoke "the territory clause." They must go further and show that in respect to commerce between the states and an organized territory, the Congress possesses an authority, free from constitutional limitations, which it does not possess in respect to commerce among the several states.

As for the accused section, the power of the Congress over commerce varies with the points from which sugars are shipped.[76] Here section 207 (e), limiting the portion of

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[75] *Hooven and Allison Company* v. *Evatt*, 324 U. S. 652, 65 S. Ct. 870.

[76] Sec. 207. (a) Not more than twenty-nine thousand six hundred and sixteen short tons, raw value, of the quota for Hawaii for any calendar year may be filled by direct-consumption sugar.

(b) Not more than one hundred and twenty-six thousand and thirty-three short tons, raw value, of the quota for Puerto Rico for any calendar year may be filled by direct-consumption sugar.

(c) None of the quota for the Virgin Islands for any calendar year may be filled by direct-consumption sugar.

(d) Not more than fifty-six thousand short tons of sugar of the quota for the Republic of the Philippines for any calendar year may be filled by direct-consumption sugar as specified in section 211 of the Philippine Trade Act of 1946.

the quota for Cuba which may be filled with direct consumption sugar, as well as section 207(d), imposing a similar restriction upon the Philippine Islands, are manifestly regulation of foreign commerce. Sections 207(a) and 207(b), imposing similar limitations, with Hawaii and Puerto Rico as points of origin, are regulations of commerce in all relevant respects domestic in character. Like Hawaii, Puerto Rico has been fully incorporated into the customs union, or national economy, known as the United States of America.[76a] And, like Hawaii, its citizens have been endowed with all the rights and liberties of "citizens of a State" in the Union.[76b] The issue, therefore, involving the commerce clause, imposes upon the champions of the accused section the necessity of justifying alike the denial to Puerto Rico of its rights within our customs union, and the legislative invasion of liberties of its citizens identical with those of citizens of the several states.

It is, however, undoubtedly true that an Act of the Congress may be an expression of one, of two, or of a number of distinct powers; and the statute must meet the limitation of all of them. It is likewise beyond doubt that in the accused section, citizens of a territory are specified as subjects of congressional disfavor. The argument concerning the power of Congress over the territories must, therefore, be fairly met.

1. *The Accused Section Is Not Sanctioned, Justified or Excused by the Power Over the Territories as Delegated by the Constitution to the Congress.*

The purpose in a shift of the battle-front from the commerce to the territory clause is obvious. The cases—as recited below—sometimes use the word "plenary"; and if plenary can be read as absolute, unlimited, despotic, if the Congress has been endowed with so irresponsible an authority, and if for its acts respecting a territory it does not

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[76a] First Organic Act, May 1, 1900 (Foraker Act), *supra*.
[76b] Second Organic Act, March 2, 1917 (Jones Act), *supra*.

have to "answer in any other place"—a host of embarrassing questions are avoided. It is then not necessary to consider the extent of its power; to have regard for its encroachment upon the liberties of citizens; to inquire into its intent in selecting the citizens of Puerto Rico as objects of its disfavor; or even to seek justification for the restrictions on personal liberty in a public purpose. All the issues in the case are swept away by a single bold assumption.

The frailties of the argument are visible. The accused section takes effect upon persons and citizens, not upon a territory. Even if, accepting the unreal as the actual, it is read as affecting territory, the overwhelming weight of legal authority, as the paragraphs below will demonstrate, is a denial of its validity. The very concept of an absolute, unlimited, irresponsible, and unanswerable authority, which underlies the argument, is contrary alike to the spirit of the Constitution, the character of our system of popular government, and the historic treatment of our territories.

The words in which are embodied the power delegated to the Congress over the territories are clear enough. This grant is not set down in Article I, Section 8, which enumerates the powers lawfully to be exercised by the Congress. Instead it appears as a part of Section 3 of Article IV, the general concern of which is the place of the states in the federal union.[77] The relevant clause in Section 3 reads, "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Ter-

[77] The position of the power in question in Article IV is not without significance. Section 1 requires each state to give "full faith and credit" to the public acts of every other state. Section 2 extends to the citizens of each state "the privileges and immunities of the citizens of the several states." By Section 4 the United States guarantees "to every state in the Union a republican form of government." The first paragraph of Section 3 provides for the admission by the Congress of new states into the Union. And the second paragraph of Section 3 recites the grant of power to the Congress over "the territory and property" of the United States. The clear presumption is the temporary character of territorial government and the eventual admission of the territory into the federal union. A territory is, in fact, a state in posse. As an entity the several sections of Article IV are all directed towards the formation of a more perfect union.

ritory or other Property belonging to the United States." A mere reading reveals how far this language falls short of the absolute power which it is claimed to confer. The territory is lumped in with "other property" of the United States; it can easily be read as land empty of people or scantily settled awaiting legislative disposition or destiny. There is within its language no reference to an organized territory, to its body politic, to any group of subjects, persons or citizens. In form the words are devoid of any reference to a political order or an operating government.

But, such matters apart, the language on its face contains a definite limitation upon the power of the Congress. It does not make the power granted absolute or sovereign; instead it limits it to the making of "rules and regulations." Although, in their desire to provide for contingencies which they could not foresee, it was the habit of the Fathers to employ broad terms, they were too precise in their language to confuse words standing for greater and lesser authority. The words "rules and regulations" were deliberately chosen; in the diction of the Constitution they are always employed in a grant of limited and specified power, never to confer an absolute and uncontrolled authority to legislate. This is borne out by usage throughout the document in respect to rules and regulations. Note, for example, the particular power of the Congress "to make rules for the government and regulation of the land and naval forces of the United States" (Art. I, Sec. 8); the specific power to "regulate commerce with foreign nations and among the several states" (Art. I, Sec. 8); the concrete authority "to establish a uniform rule of naturalization" (Art. I, Sec. 8); the special power "to coin money and regulate the value thereof" (Art. I, Sec. 8). It is not difficult, in this restricted meaning, to find the Congress possessed of adequate power to prescribe rules and regulations in respect to a territory, such as Puerto Rico. For there the ancient liberties of its citizens have been recognized, a government has been organized, a system of law has been established; and the task

of rules and regulations has come to be the adaptation of our political system and our legal code to the status of the island and its citizens. The language of the clause does not convey, it does not even suggest, the grant to the Congress of a general and unlimited power to do as it will with the territories.

Even if the words "rules and regulations" are to be accorded the fullness of meaning claimed for them, the case is not made out. The Constitution specifies that such rules and regulations must be "needful". The word "needful" is left unrelated, but the whole context suggests that the need is that of the territory and its people. There is neither word nor implication to suggest—much less to dictate—that the "need" of a group on the continent, in this instance the small group of sugar refiners, is to be used as a sanction for an irresponsible regulation imposed upon an organized territory. Above all, the language employed gives no warrant by text or inference for assuming a power in the Congress to abridge the liberties of citizens of the United States who happen to live or to do business in the territories to the sole advantage of citizens of the United States living on the mainland. It is only reasonable to assume that the Fathers of the Constitution knew how to say what they meant. If by this statement they had intended to delegate to the Congress the power, at its pleasure, to invade the rights of the citizens of the United States resident within its territories, they would doubtless have known how to convey their meaning.

2. ***The Ordinance of 1787 for the Good Government of the Northwest Territory, Which Throughout the Nation's History Has Served as the Model in Formulating a Political Order for a Territory, Gives No Support to the Proposition That the Power of the Congress Over the Territories Is Absolute and Irresponsible.***

It happens that there is a gloss on the provision in the Constitution granting to the Congress the power "to make

needful . . . regulations . . . in regard to the territory . . . of the United States" which is alike contemporary and authoritative. On the 13th of July, 1787, while the Fathers of the Constitution were in session, there was enacted "by the United States in Congress assembled" an "Ordinance for the government of the territory of the United States northwest of the river Ohio." The two bodies—the Continental Congress and the Constitutional Convention—were in session at the same time, the one in New York, the other in Philadelphia; the two bodies had a number of members in common; [78] there was constant traveling by members between the two places.[79] The Ordinance gives unimpeachable evidence to the meaning of the provision in the Constitution.

The Ordinance [80] in terms which have endured to this day spells out the limits of congressional power. It allows the Congress for an interim period, until civil government can be established, a larger freedom in the government of the territory than thereafter it was to enjoy. The mark of the social revolution which attended the resort to arms to make secure the newly declared independence finds expression in the outlawing alike of the rule of primogeniture (Section 2) and in the prohibition of a state religion (Section 3). It projects "the common law", with all the rights and liberties which attend it, into the territory (Articles I and II). It provides the time-honored resort to court for the redress of wrongs. It guards persons, whether citizens or aliens, against the well-known abuses of legal process (Article II). It secures to the inhabitants of the territory the ancient rights of habeas corpus, trial by jury, and the like (Article II). It accepts for the territory "such laws of the original states as may be necessary and best suited to the circumstances of the district" (Section 5). It provides for a modification of these laws by the general assem-

[78] Among them Abraham Yates, Rufus King, and Roger Sherman.

[79] A copy of the ordinance as enacted was delivered to one George Washington, the presiding officer of the Conventions on July 15, 1787, by the hand of Richard Henry Lee, a member of the Continental Congress.

[80] Ordinance of July 1, 1787, *Formation of the Union of the American States* (69th Cong., 1st Sess., House Document No. 398) 47-54.

bly of the territory to meet distinctive circumstances then present or later to be encountered (Section 5). It limits the power of the Governor, who is to be appointed by the Congress, as self-government is firmly established.

The Ordinance—conforming to the accepted political theory of the day—is written in the form of a social compact between the Congress and the people of the territory (Section 14). It rests squarely upon the principle that a just government derives from the consent of the governed. So insistent is the document upon "the fundamental principles of civil and religious liberty" which "form the basis of these republics, their laws and constitutions," that it seeks "forever hereafter" to "fix and establish those principles" as "the basis of all laws, constitutions and governments which are to be erected in the territory". The constitution and government of all states hereafter to be formed within this territory are to be republican in character (Article V). The highways of the territory are to be "forever free, as well to the inhabitants of the said territory as to the citizens of the United States" (Article IV). And "in no case shall non-resident proprietors be taxed higher than residents" (Article IV). In fact all discrimination between citizens living in the territory and in any one of "the original states" is broken down. Directly in point there, "no man shall be deprived of his liberty or property but by the judgment of his peers and the law of the land" (Article II). Most important of all, the Ordinance directs government towards the welfare of the people, their progress, and the eventual resolution of the territory into states of the Union (Section 13).

In time it is a far call from 1787 to 1949; in securing the human liberties of the people in the territories the Northwest Ordinance and the Organic Act for Puerto Rico are near together. There has been no jump across sixteen decades from the one document to the other. A series of intermediate enactments, establishing governments for various territories, fill in the intervening time.

Citations to a number of these acts of Congress which are typical are set down on the margin.[81] Into the reiterated detail of their provisions it would be tedious here to go. The continuity of "principles", and the abiding character of the rights and liberties which it is sought to protect under a constitutional government, is attested by all that is common to the Ordinance and the Organic Act. That there was no direct copying is evident; that the Organic Act is the last in a series of mutations on the enduring theme of good government for a territory is equally evident. As an epitome of our territorial government note the reiterated theme of an equality before the law which is not to be stayed by difference in race, religion or culture or by the fact of annexation through conquest or cession. The Northwest Territory consisted of lands which largely passed to the United States by conquest and cession; Puerto Rico came into our Federal Union through conquest and cession. The Ordinance provides that "in their property, rights and liberty", the Indians who from days of old had possessed the land should never be "invaded or disturbed." The Organic Act provides that all who had been born in Puerto Rico under Spanish rule, as well as their children, are to "enjoy all the rights possessed by natives living within the several states." The Ordinance was "done . . . in the year . . . of Independence the twelfth." Can it be that the rights and liberties which it proclaims had been lost in the year of Independence one hundred and seventy-fourth?

3. *The Traditional Interpretation of the Clause by the Courts Give No Support to the Proposition That at Its Pleasure the Congress May Deny or Abridge the Liberties of Citizens of the United States Living or Doing Business in a Territory.*

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[81] Alabama—March 3, 1817, C. 56, 3 Stat. 371, April 20, 1818, C. 127, 3 Stat. 468; Alaska—May 17, 1884, C. 53, 38, 23 Stat. 24, June 6, 1900, C. 786, Title I, 31 Stat. 321; Arizona—Feb. 24, 1863, C. 56, 12 Stat. 664; Iowa—June 12, 1838, C. 96, 5 Stat. 235; Indiana—May 7, 1800, C. 41, 2 Stat. 58; Mississippi—April 7, 1798, C. 28, 1 Stat. 549; Ohio—April 7, 1789, C. 8, 1 Stat. 50.

The Northwest Ordinance has set the pattern for the government of a territory. The Constitution has appointed orbits to every branch of the federal government. And just as distinct, even though at times overlapping, tasks are entrusted to its several departments, so the area within which each agency of government operates is defined. None of the powers delegated by the people to the Congress through Article I, Section 8 of the Constitution has been held to be absolute.[82] It is hardly plausible that a grant of power in Article IV, Section 3—itself set down in conditional terms—should be subject to a type of interpretation elsewhere unknown to our fundamental instrument of government. That the Congress is the supreme legislature for Puerto Rico, and that its Acts take precedence over the mandates of the local legislature is elementary. But if the Congress has the highest power, it does not follow that it has absolute power. If it possesses power in fullness or plenitude, it does not follow that the power is unlimited. In fact the courts have never held the grant of power to the Congress over the territory of the United States to lie outside the Constitution.

The argument for the absolute power of the Congress has again and again been presented to the courts. Its principal frailties are that it deals with a territory as if it were a "property of the United States" and that it disregards as irrelevant the rights and liberties of persons, citizens of the United States, who happen to reside or to do business there. In the ruling case of *Scott* v. *Sanford*,[83] 19 Howard

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[82] It seems unnecessary here to survey in detail so elementary a subject as the standards by which and the limits within which the Congress is to exercise the power conferred upon it by the commerce clause.

[83] The case of *Scott* v. *Sanford*, *supra*, known to the history books as "the Dred Scott case", has, of course been subject to great controversy. Here two characteristics of the opinions are to be briefly noted. The first is that holdings by the several justices who made up the majority, whether explicit or implicit, to the effect that human beings can become objects of property, are obsolete. But, with this admission, the argument of the court to the effect that a citizen of the United States, who goes to a territory, or there engages in business, is not thereby deprived either of his liberty or of his property is as valid today as it has been down the decades.

The second is that, in view of the diverse expression of views by the nine justices, there is no "opinion of the court". This difficulty is fully met by

393, 15 L. Ed. 691, the errant contention is met with complete refutation. It is said, *ibid.*, p. 735, "there is asserted a power in Congress, whether from incentives of interest, ignorance, faction, partiality or prejudice, to bestow upon a portion of the citizens of this nation that which is the common property and privilege of all". Such an argument attempts to turn "the territory clause" into a forfeiture by some citizens of that equality of rights and immunities[84] "which belongs to every citizen of the United States".

A shift from territory as land to its inhabitants as persons and citizens[85] subdues dictatorial into constitutional authority. The authority of the Congress in respect to a territory can never be "a mere discretionary power under our Constitution and form of government". The Federal Government enters into possession of a territory "in the character impressed upon it by those who created it. It enters upon it with its powers over the citizens strictly defined and limited by the Constitution from which it derives its own existence and by virtue of which alone it continues to exist and act as a government". It "cannot, when it enters a territory of the United States, put off its character and assume discretionary or despotic powers which the Constitution has denied to it." Nor can it "cre-

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two devices: namely, that that which is concurred in by five justices is "the opinion of the court", and that, however diverse the original opinions, the citation by later benches who have spoken for the Supreme Court make such utterance canonical. The passages quoted from the opinion of Mr. Chief Justice Taney have been carefully chosen to meet both of these tests. The language quoted has been frequently cited in later cases.

[84] It has sometimes been argued that the Fifth Amendment contains no equal protection clause. The contention raises a question of rhetoric, not of substance. As discussed elsewhere in this brief, a man's trade is alike a "liberty" and a "property". The police power may be used, when necessary to abridge the liberties or the property rights of persons similarly situated. But to abridge the liberties or property rights of some, and not of others, among those who are in a like situation is a deprivation of liberty or property without due process of law. The matter is too elementary to require detailed exposition.

[85] In a forthcoming treatise on the writing and ratification of the Constitution, Professor William Crosky, of the Law School of the University of Chicago, sets down a long chapter on "the Language of the Fathers." In it among other things, he points out the use of single proper nouns with plural verbs. "Virginia think", "Pennsylvania oppose", "Massachusetts concur" can have meaning only if the names of the states are read as standing for the people, or the organized communities, thereof.

ate for itself a new character, separated from the citizens of the United States, and the duties it owes them under the provisions of the Constitution". *Ibid.*, p. 719. The "power over persons and property"[86] here contended for, "are not only not granted to Congress, but are in express terms denied", *Ibid.*, p. 719. This prohibition against the taking of "life, liberty and property" is not "confined to the States, but the words are general and extend to the whole territory over which the Constitution gives . . . power to legislate . . . It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a territory, so far as these rights are concerned, on the same footing as citizens of the States and guards them as firmly and plainly against any inroads which the general government might attempt."[87] *Ibid.*, p 735. "Scarcely anything more illogical or extravagant can be imagined than the attempt to deduce from this provision in the Constitution a power to destroy or in any wise to impair the civil and political rights of citizens of the United States. And to clinch the argument the court sets down as even

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[86] The expression "life, liberty, and property" has become a term of art. It is a general phrase whose meaning, like that of "last clear chance", "restraint of trade", and "due process of law", is not to be discovered by looking up the several words in the dictionary. The several words do not possess mutually exclusive meanings. The phrase is rather a comprehensive term for all the rights and liberties reserved by and to individuals against their government. Note the older form of "lives, liberties, and estates" as used in the Petition and the Bill of Rights. There the word "estate" is employed not as currently used in "debtor's estate" and "decedent's estate", but as standing for one's station in life, with all the privileges, prerogatives, and responsibilities attaching thereto. One's estate is personal; the property—a short word for propriety—is not the estate, but the instrument for supporting the estate. Note historically in England the three estates of the lords, the clergy, and the commons. In general the estates of the members of common consisted of the wares, the facilities and the opportunities of trade. Note, too, the estates general of France and in support of the Declaration of Independence the pledge of our forefathers "to each other" of "our Lives, our Fortunes, and our sacred Honor". In the medieval scheme, rights were the rights of persons in respect to things. In the rights and liberties reserved by the people through the Constitution this usage has prevailed. A dominant and inseparable aspect of the civil rights has always been the right to economic opportunity. It is of significance that even in the days when due process rode high, it was the "liberty of contract", rather than the right of property, which the courts were so insistent to protect.

[87] Note that by the Organic Act, as amended, the rights of citizens of Puerto Rico are defined in terms of the rights of citizens of the several states.

more illogical and extravagant the power of the Congress "to establish inequalities . . . by creating privileges in one class of those citizens and by the disfranchisement of other portions or classes".

The territorial doctrine as set down in *Scott* v. *Sanford, supra,* is to be described as the judicial version of the Northwest Ordinance. In the period between the Civil and the Spanish wars that doctrine was in general followed by the courts. There was some dispute as to just how far the Congress could go in legislating in respect to territories, but none as to its lack of authority to invade the rights and liberties of the people living there. Thus in *Thompson* v. *State of Utah,* 170 U. S. 343, 18 S. Ct. 620, the case of *Murphy* v. *Ramsey,* 114 U. S. 15, 5 S. Ct. 747, is quoted to the effect that since "the people of the United States" are "sovereign owners of the national territory," they have supreme power over them and their "inhabitants". And, inasmuch as "in the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated", the power of the Congress is rather substantial. But the court is careful to insist that all such delegated power, however broad its scope, is subject to "such restrictions as are expressed in the Constitution or are implied in its terms." To the court the rationale is obvious; those who emigrated to this country from England brought with them, as "a birthright" that "admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power". Other cases to the same effect are: *First National Bank* v. *County of Yankton,* 101 U. S. 129, 25 L. Ed. 1046; *American Insurance Co.* v. *356 Bales of Cotton,* 1 Pet. 511, 7 L. Ed. 242; *U. S.* v. *Gratiot,* 14 Pet. 526, 10 L. Ed. 573; *Cross* v. *Harrison,* 16 How. 164, 14 L. Ed. 889.

4. *The "Insular Cases" Give No Support to the Proposition That the Power of the Congress Over a Territory Is Absolute and Irresponsible.*

The war with Spain brought with it a new climate of opinion. Talk of "the white-man's burden" and of "manifest destiny" was in the air, and an influential group of people spoke of "overseas empire". There were novel questions as to whether the provisions of our Constitution and our system of free government could be applied to peoples habituated to another culture and living at a distance from us. There was as regards overseas possessions a demand for an enlarged national authority which had never arisen in connection with contiguous territories. The logic of dominion was not clear-cut; no familiar criteria sharply separated Puerto Rico from the territories of the Northwest, Kansas, Oklahoma. Like Puerto Rico, the Northwest Territory was acquired by cession. Many a peace pipe was smoked with the Red Man to secure the opening to white settlement of Indian territory. The whole of Louisiana Territory came to us by cession. Nor was culture an adequate criterion; for at the time it was acquired the Province of Louisiana in its customs and institutions was as French as Puerto Rico was Spanish. It has often been argued that, in legislation for our insular possessions, "a reason exists"[88] which does not obtain in respect to territory contiguous to the States. It, of course, goes without saying, in respect to a territory like Puerto Rico, that "temporary expedients" may have to be employed; that, it may be necessary to "adapt" laws to local conditions; and that, because of distance, an alien culture, and a lower economic level, the process of organic linkage with the several states will have to be effected by a series of steps rather than by a single over-all act. But in bringing to pass the more perfect union it is adaptation, not sheer creation which was called for. The issue of a "plenary" or even "sovereign" power of the Congress, to the front in the newspapers and in the political campaign of 1900, in course of time reached the courts.

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[88] Dissent by Justice McReynolds in *Springer* v. *Philippine Islands*, 277 U. S. 189, 48 S. Ct. 480.

The dominant case, in respect to our insular possessions, is *Downes* v. *Bidwell*, 182 U. S. 244, 21 S. Ct. 770.[89] The case came to a hearing after the Foraker Act was passed, before it was superseded by the Organic Act of 1917, before the proclamation by the Congress of a bill of rights for Puerto Rico,[90] and before the extension of the liberties of the citizen of a state to the members of the body politic known as the People of Puerto Rico. Thus the case needs to be read in the light of the status of the island at the time. Two other requisites are essential to fathom the views of the justices and to discover the opinion of the court. The one is constantly to keep in mind the exact question which the Court was called upon to answer; the other is to remember that propositions concurred in by a majority of the court can be discovered only by a careful comparison of the several opinions. All of this means alertness, careful analysis and industry; a time-consuming process which not all who have cited *Downes* v. *Bidwell* have been willing to take. Too often—sometimes even by the courts—the hearsay of later opinions has been accepted for what the court actually ruled. Language from the opinion of Mr. Justice Brown—who, in delivering the judgment of the court, spoke only for himself—has been accepted as canonical and statements addressed to a specific issue have been read as if they were propositions of universal validity. Now and then judges who have not probed the matter for themselves have accepted as authority that which is *dicta*, often *dicta* concurred in by less than a majority. This word of caution is necessary; for the scrutiny of the justices in *Downes* v. *Bidwell* is far more searching than the "clarification" sometimes given to it by later judges.

The question presented to the Court in *Downes* v. *Bidwell* was immediate. Its concern was the validity of the third Section of the Foraker Act imposing upon merchandise imported into Puerto Rico from the United States, or into

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[89] An earlier case, *DiLima* v. *Bidwell*, 182 U. S. 1, 21 S. Ct. 743, had ruled that Puerto Rico was not "a foreign country".

[90] Organic Act of 1917, Sec. 2.

the United States from Puerto Rico, a duty of "15 per centum of the duties which are required to be levied . . . upon like articles of merchandise imported from foreign countries." The duty in question was a "temporary expedient"; the monies collected were to be covered into the treasury of Puerto Rico to defray the expenses of the insular government; the civil government of Puerto Rico, as and when constituted, was empowered to institute its own revenue system and thus to put an end to the impost. The immediate issue, upon which the court, in a division of five to four, found the tax valid, has long since passed into history. But the discussion on the power of the Congress over the territories which the case provoked has endured. It is the larger "doctrine", not the instant holding which today has significance. Because of the number of separate utterances, the precautions set down in the paragraph above are essential to a correct reading of the case.[91] It is especially necessary to see that nothing is quoted which is not concurred in by at least five of the brethren. For reading the case, a sharp eye must be kept out for the distinctive reasons recited for holding a temporary expedient valid and the appropriate limits permanently assigned to the power of the Congress over the people of the territory. It is the latter alone which is of concern here.

In the case of *Downes* v. *Bidwell*, the minority held the key position. The dissenters stood squarely for the time-honored doctrine of a limited congressional power and urged that the Congress had no authority to impose the duty. The majority, splitting three ways, used diverse intellectual routes to reach a common goal.[92] Thus it was held that "Puerto Rico is a territory appurtenant and belonging to the United States," and that, at least for the

[91] In announcing the judgment of the court, Mr. Justice Brown delivered an opinion. Mr. Justice White wrote a concurring opinion in which McKenna and Shiras, JJ., joined. Mr. Justice Gray also wrote a concurring opinion. Mr. Chief Justice Fuller, and Harlan, Brewer and Peckham, JJ., dissented.

[92] It is the case of *Downes* v. *Bidwell* which inspired Mr. Dooley to the clever and none too accurate remark that "the Supreme Court follows the illection returns."

time, it was not "a part of the United States" within the clause of the Constitution requiring that, in the exercise by the Congress of its power to levy taxes and to collect revenue, "all Taxes, Duties, Imposts and Excises shall be uniform throughout the United States." (Art. I, Sec. 8.) Note that the holding that it is not a part of the United States has reference only to the status of Puerto Rico at the moment and that it is set down only in reference to a specific clause in the Constitution.

It is true that in a technical sense, there is no opinion of the Court. But the opinion of Mr. Justice White, concurred in by Mr. Justice McKenna and Mr. Justice Shiras, has by common consent been regarded as the opinion of the Court. In respect to the immediate issue of the reasons for the validity of the tax, Mr. Justice Brown and Mr. Justice Gray speak for themselves, and Mr. Justice White's is the voice of no more than three. But, once the immediate question is left behind, his opinion is freed from all doubt. The high regard for it is accurate in respect to the disquisition upon the power of the Congress over the territories, for here a majority of his brethren concur. The four dissenters would put the propositions he states even more vigorously. And since his opinion is concurred in by two of his brothers, only Brown and Gray, J.J., are—and very dubiously—left out. Mr. Justice Brown severely limits his argument to the proposition that, as respects the requirement of uniformity in taxation, Puerto Rico was not to be treated as an organic part of the United States and Mr. Justice Gray contends only that the civil government of the United States does not extend immediately and "of its own force" to territory acquired by cession; that an act of the Congress is essential to establish the insular civil government; and that a temporary government is not subject to all the restrictions of the Constitution.

In his usual thorough and logical manner, Mr. Justice White subjects the power of the Congress over the territories to a searching inquiry. "Every function of the gov-

ernment" is "derived from the Constitution . . . whenever a power is given by the Constitution and there is a limitation imposed . . . such restriction operates and confines every action on the subject within its constitutional limits . . . this does not presuppose that the Constitution may or may not be applicable at the election of any agency of the government."

Mr. Justice White continues, "The Constitution has undoubtedy conferred on Congress the right to create such municipal organizations as it may deem best for the territories . . . whether incorporated or not . . . to give to the inhabitants as respects local government such degree of representation as may be conducive to the public well-being . . . and to change local government at discretion." But he does not confuse the power of the Congress over the form of the government with the power to invade the liberties of the people. He insists that "this . . . does not imply that the authority of Congress to govern the territories is outside of the Constitution since the right is founded on the Constitution." And, "as Congress in governing the territories is subject to the Constitution, it follows that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject." It "follows, also, that every provision of the Constitution which is applicable to the territories is also controlling therein". The Congress, it is true, has quite a latitude in respect to the "form and manner in which a conceded power may be exercised"; but there are "general prohibitions in the Constitution in favor of the liberty and property of citizens" which are "limitations which in the nature of things cannot be transcended". In this domain there is on the part of the Congress "the complete absence of power".

Mr. Justice White, reciting the authorities,[93] makes much

[93] See Debate in the United States Senate on Feb. 24, 1849, on an amendment offered by Mr. Walker extending the Constitution and certain laws of the United States to California and New Mexico. Notice Webster's position (20 Cong. Globe, App., p. 272).

of the distinction between "the two characters of restrictions" to be found in the Constitution. He insists that there must be no confusion between "those which regulate a granted power and those which withdraw all authority on a given subject." Against the contention that, admitting that such a distinction exists, it has no validity in respect to the power of the Congress over the territories, he insists that "those absolute withdrawals of power which the Constitution has made in favor of human liberty are applicable to every condition or status".[94] In application to the instant case, the abridgement of the rights of the people of Puerto Rico would end—as it actually did end—with cession, while the ancient rights and liberties of the people of Puerto Rico would endure until they were replaced by the richer and more secure guarantees of our Constitution.

As regards the power of the Congress over the territories, the dissenting justices are—though even more insistently—in substantial accord with Mr. Justice White. To cite a single example, the following passage from the opinion of Mr. Justice Harlan, like many others in his opinion and that of Mr. Chief Justice Fuller, might be interpolated into the White opinion without breaking the stride of the argument. In forthright terms Mr. Justice Harlan argues that the only source of legislative power is "the supreme law of the land". He points out that there are "certain prin-

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[94] To that effect he quotes Mr. Justice Field, speaking for the Supreme Court, in *Chicago, Rock Island and Pacific Ry. Co.* v. *McGlinn*, 114 U. S. 542, 5 S. Ct. 1005, to the effect that "it is a general rule of public law . . that whenever political jurisdiction and legislative power over any territory are transferred from one country to another, the municipal laws"—that is the "laws which are intended for the protection of private rights—continue in force until abrogated or changed by the new government". And, as against any peradventure, Mr. Justice Field reiterates that whereas by cession "public property passes from one government to the other . . . private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment." Mr. Justice Field goes on to insist that "all laws, ordinances and regulations in conflict with the political character, institutions and constitution of the new government are at once displaced" and to specify that, with cession "the laws of the country in support of an established religion, or abrogation of the freedom of the press, or authorizing cruel and unusual punishments and the like would at once cease to be of obligatory force without any declaration to that effect." But "municipal laws", designed to protect the life, liberty and property of the people would remain in effect."

ciples of natural justice . . . which need no expression in constitution or statute to give them effect or to secure dependencies against legislation hostile to their real interests". Yet the Fathers of the Constitution proceeded upon the theory that "the only safe guarantee against governmental oppression was to withhold or restrict the power to oppress". Had that been their wisdom, they might have written into the Constitution a declaration that "the Constitution, laws, and treaties of the United States constituted the supreme law only in the states" and that "outside of the states the will of Congress was supreme". But the Fathers did nothing of the kind. On the contrary they made "this Constitution, and the laws of the United States which shall be made pursuant thereto, and all treaties . . . under the authority of the United States . . . the supreme law of the land." As respects the power of the Congress over the territories, "that the convention struck out the words, 'the supreme law of the several states' and inserted 'the supreme law of the land' is a fact of no little significance. The 'land' referred to manifestly embraced all the people and all the territory, whether within or without the states, over which the United States could exercise jurisdiction or authority."

In general the courts have followed the opinion of Mr. Justice White—that is of the court—in *Downes* v. *Bidwell, supra.*[94a] There has, it is true, been some confusion over the term "plenary power of Congress", and it has not been easy to understand exactly what the learned Justice meant when he admitted that Puerto Rico was not a foreign country,[95] yet insisted that "in a domestic sense Puerto Rico was a foreign country." The word "plenary" was not sharply defined; there are degrees of plenitude. And later courts have neither given to the term sharp definition nor

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[94a] For a critical survey of the series of cases see: Ramírez, Marco A. "Los casos insulares," 16 Revista Jurídica de la Universidad de Puerto Rico 121 (1946). This article is also available in English at the Harvard Law School Library, it being a LL. M. thesis submitted in 1942.

[95] *De Lima* v. *Bidwell*, 182 U. S. 1, 21 S. Ct. 743.

appointed to it well-defined limits. It seems needless to multiply the kind of citations set down in the margin.[86] It is admitted that the Congress may amend or revise territorial statutes; that it may veto Acts of territorial legislatures and may superimpose its own Acts. It is cheerfully conceded that in respect to the territories the Congress possesses a plenitude of legislative power. But all of this neither defines legislative power nor denies its constitutional limitations.

5. *The Power of the Congress to Enact the Accused Section Can Draw No Support From the Lack of the Complete Incorporation of Puerto Rico Into the Body Politic Known as the United States of America.*

The argument for the accused section shifts the battle-front from the liberties of persons to the power of the Congress over that territory. The weakness of that position suggests a retreat to a second line of defense. Hence it is argued that Puerto Rico is an "unincorporated territory" and that over such a territory there exists a larger legislative power than over a territory fully incorporated into the Union. The minor premise of fact as well as the major premise of law alike invite attack.

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[86] There is no verbal magic in the word "plenary" which provides an escape from constitutional limitations. The fullness within the limits of the power neither defines nor enlarges that power. It does not—and has not been made to—mean absolute, unlimited or irresponsible. The relevant cases give little warrant for giving such generous boundaries to the word. In the older case of *National Bank of Brunswick, Maine* v. *County of Yankton*, 101 U. S. 129, 25 L. Ed. 1046, the word is given meaning by its context. The Congress has "full and complete legislative authority over the people of the territories"; that is, whatever legislative power there is to be exerted by the Congress, to the exclusion of any other body claiming it. But, as is usual, it gives no definition of the nature or limits of the authority which is to be fully exercised. In *Bacardi Corporation* v. *Domenech*, 311 U. S. 150, 61 S. Ct. 219, a statute of Puerto Rico regulating the use of trade-marks was struck down as contrary to a treaty of the United States. The power of the federal government was held to be plenary in the sense that the treaty power takes precedence over the power of a territorial legislature. In *Cases* v. *The U. S.*, 131 F. (2d) 916, it is ruled that the Congress has full power to make all needful rules and regulations in respect to Puerto Rico. And in *Sancho* v. *Bacardi Corp. of America*, 109 F. (2d) 57, and *Buscaglia* v. *Ballester*, 162 F. (2d) 805, it is held that the power of the Congress over the territories stands on its own feet and that its plenitude derives—and needs to derive—no support from the commerce clause.

Behind the argument which enlarges the power of the Congress at the expense of the people of Puerto Rico, by the device of calling the island an unincorporated territory, lurks an inarticulate major premise. Clarity demands that this assumption be made explicit. It is that we are again drifting into an age of competitive nationalism, that security for the United States has come to be among the most imperative of values, that our off-shore territories must be appraised from the standpoint of military potential; and that the power of the Congress must be adequate to deal with any emergent world-disturbance. For that reason there should be authority to seize and govern territory and even to exploit the people of ceded or conquered lands for the benefits of the people of the continental United States.

To this deeply felt — but usually unexpressed — argument the answer is clear. It is here enough to say that the values it seeks to secure are not served by the accused section of the Act and would in no wise be impaired by a declaration of its invalidity. The Congress might possibly decree that sugar is an essential commodity; that, in anticipation of war, the continent should guard against being cut off from off-shore sources; and that security demands the location of the industry on the mainland. But the Congress has done nothing of the kind. Nor is the Congress likely to do so unwise a thing; for the blow to the economics of off-shore political units—and the resulting impairment of loyalty to the United States which would be of inestimable consequence—would be a terrific price to pay for a guarantee against a very dubious contingency. But the point is that the Congress has decreed admission to the continental market of 910,000 tons of sugar from Puerto Rico. The accused section is concerned wholly with the form in which this sugar may come in, a matter alien alike to military potential and national security.

Nor, on a less vital plane, does the invocation of the words "incorporated" and "unincorporated" touch the issue. Our several territories differ in the patterns of their rela-

tions within and to our federal union. The status of each is to be found in a series of acts; and into the detail of the exact position of each within, and its precise relation to, the federal system known as the United States of America, it is as needless as it would be tedious to go. Hawaii, for example, came into the Union by an Act of Annexation which provided that it was to become an integral part of the United States. See *Hawaii* v. *Mankichi*, 190 U. S. 197, 23 S. Ct. 787; the Internal Revenue Act of 1918, Section 1; Internal Revenue Code, Sections 1532(f), 3526(e), 3797(a)(9). Puerto Rico became American territory by the Treaty of Paris which, with reservations and qualifications—as explained in Section A above—left its future status to be spelled out in detail by the Congress. Hawaii was incorporated into "the land" by a single formal act; Puerto Rico has been gradually led towards a more perfect union by a long series of acts. Surely the law does not draw a distinction as to whether a status was achieved by a single jump or a series of steps. The term "unincorporated" has been lifted from the part of the holding in *Downes* v. *Bidwell*, *supra*, concerned with the validity of the tax on import adopted by the Congress as a temporary expedient. At the time, the civil government had not yet been organized and the citizens of the island had not yet been formally endowed with the liberties and privileges of the citizens of the states. To make the word "unincorporated" serve the accused section, it is necessary to isolate it from its frame of reference and convert it into a legal proposition of universal validity. In reading *Downes* v. *Bidwell*, it is well to heed the oft-quoted caveat of Mr. Chief Justice Marshall, "It is a maxim, not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used." *Cohens* v. *Virginia*, 6 Wheaton 264, 399, 5 L. Ed. 257.[97]

As a general term it is difficult to endow the terms "in-

[97] See also *Humphrey's Executor* v. *U. S.*, 295 U. S. 602, 627, 55 S. Ct. 869 873, and cases cited there.

corporated" and "unincorporated" with any directive or compelling authority. Ever since the Treaty of Paris, the status of Puerto Rico within the federal system has been changing and the series of issues concerning Puerto Rico with which this court had been confronted have had to be answered, not in terms of a general definition of its political status, but of the status which at the various times of decision the island occupied in the federal system. As it has been put by this Court in an opinion concurred in by all its members, " . . . it is evident that whether Puerto Rico comes within a given congressional act applicable in terms of a 'territory' depends upon the character and aim of the act. . . ." *People of Puerto Rico* v. *Shell Co. (P. R.), Ltd.*, 302 U. S. 253, 257-8, 58 S. Ct. 167, 169.

As respects customs duties, Puerto Rico—held to be unincorporated at the time of the insular cases—is now fully incorporated into the union. Between the island and "the states" there are no tariff barriers.[98] As respects aspects of "internal revenue", it is not as yet fully incorporated. Our system of income taxes has not been extended to the island, not, it is to be noted, as the withholding of a benefit, but because it is a burden which the low level of income will not permit the people of Puerto Rico to bear. The insular has, in fact as well as at law, been fully incorporated into the national economy. Although the Congress is the supreme legislature for Puerto Rico, it has by this court been held to have the power of a state to hold its industries to the competitive pattern through its own antitrust law. *Puerto Rico* v. *Shell Company, (P.R.), Ltd.*, 302 U. S. 253, 58 S. Ct. 167. In respect to commerce by water with the mainland Puerto Rico has been fully incorporated; as a beneficiary of our system of national defense, the island is incorporated territory.

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[98] If the accused section is held valid, a qualification is to be set down. In that event, there are no barriers to the admission of goods from the several states into Puerto Rico. Yet the Congress will have been vested with the power to deny admission of goods from Puerto Rico into the continental United States. The resulting lack of mutuality in the customs union is evident.

If the Organic Act contains a separate Bill of Rights for the People of Puerto Rico, the intent is to accommodate our liberties to a territory habituated to the civil law. The issue in the insular cases, as Mr. Chief Justice Taft has put it, is not "whether the Constitution extended to Porto Rico when we went there, but which ones of its provisions were applicable." *Balzac* v. *People of Porto Rico*, 258 U. S. 298, 313, 42 S. Ct. 343, 348. The plain reason is that "the Constitution . . . contains grants of power and limitations which in the nature of things are not always and everywhere applicable." And, in instances where Constitutional provisions are held not to reach Puerto Rico, it is not that they are withheld, but rather that they are not to be forced upon a people with an alien tradition. Thus, in respect to trial by jury, Puerto Rico has not fully incorporated "local practice" and "procedure does not permit its use in civil cases".[99] It is not, however, that a fundamental right has been withheld; it is rather that the government of the United States has been "sedulous to avoid forcing a jury system upon a Spanish and civil law country until it desired it." *Balzac* v. *Porto Rico, ibid.*, 348. In terms of immunity to suit without its own consent, the Government of Puerto Rico has the status of a state in the Union. *People of Porto Rico* v. *Manuel Rosaly of Castillo*, 227 U. S. 270, 33 S. Ct. 352.

In general the provisions of the Constitution—not at the will of the Congress but where applicable—extend to Puerto Rico. "The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted." *Balzac* v. *Porto Rico, supra*, 348. And "the guarantee of certain fundamental personal rights, as for instance, that no person could be deprived of life, liberty or property without due process of law, had from the beginning full application in Porto Rico". *Ibid.* 348. If the terms "incorporated" and "unincorporated" signify only within a frame of refer-

[99] *Iriarte* v. *U. S.*, 157 F. (2d) 105.

ence, Puerto Rico has been fully incorporated in respect to the only questions which are relevant here. For, in terms of the liberties of the people, including the ancient liberty of a trade, its citizens have the rights of citizens of a state. And, if a territorial question is here to be raised—which we do not admit—the territory of Puerto Rico has been fully admitted to the customs union—that is to the national economy—of the United States. In a word it is fully incorporated in respect to any issue which may be raised here.

But how plenary or incomplete is the inclusion of Puerto Rico in the Federal Union is beside the point. For Section 207(b), as it affects citizens of Puerto Rico and Section 207(a) as it affects citizens of Hawaii are save for the number of tons identical. They give expression to the same congressional intent; they have the support of the same argument. Alike they abridge the liberties of people living off-shore to confer special privileges upon people living on the mainland. They are alike attempts to put the same mercantilist principle into practice. Yet, whatever may be the deficits in respect to the status of Puerto Rico, Hawaii has been completely made a part of the Federal Union.[100] It is unthinkable that enough magic lies in the words "incorporated" and "unincorporated" to find valid a discriminating provision as it affects the people of Puerto Rico, and to find invalid exactly the same provision as it affects the people of Hawaii. The rights of men, as Mr. Justice Reed put it in *Smith* v. *Allwright*, 321 U. S. 649, 664, 64 S. Ct. 757, are not to be made to turn upon whether the denial is overt or indirect.

An attempt to liken Puerto Rico to the Philippine Islands and thus to throw up a barrier in defense of the accused section has a double weakness. The cases do not say what it is needful that they should say to serve such a purpose; and

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[100] A larger measure of self-government has been accorded to Puerto Rico than to Hawaii. It has the greater power in respect to the insular system of internal revenue. Puerto Rico, unlike Hawaii, has by a recent Act of Congress—(Pub. Law 362, 80th Cong., 1st Sess., 1947)—been authorized to elect its own governor and other officials.

the status of Puerto Rico is not and never has been that of the Philippine Islands. Before its cession to the United States, Puerto Rico was an organic part of Spain; its citizens were citizens of Spain; it was represented both in the Senate and in the Cortes of the Peninsular Government. The Philippines were never an organic part of Spain; its people were never in fact citizens of Spain; it was never represented in the Spanish Parliament. As is pointed out by Mr. Chief Justice Stone for the Court in *Hooven and Allison* v. *Evatt*, 324 U. S. 652, 65 S. Ct. 870, and by Mr. Justice Murphy, concurring in part, *Ibid.* 691, every step taken by us in the formulation and execution of our public policy towards the Philippine Islands has aimed at eventual independence. As the account above has shown in detail, every step in the formulation and execution of our public policy towards Puerto Rico—the enactment of the accused section aside—has been shaped towards a more perfect union.

In the leading case of *Cincinnati Soap Co.* v. *U. S.*, 301 U. S. 308, 57 S. Ct. 764, the concern is with a farm relief measure for the producers of "copra, coconut oil or allied products". In the act, as in our first Agricultural Adjustment Act, a tax for convenience is assessed upon the processor, and the collections are to be covered into the treasury of the Philippine Islands. They are presumably to be paid out in benefits to the purchasers who subject their operations to the prescribed scheme of control. The act has little in common with the accused section; it seems quite untainted with discrimination between American citizens; it is in no sense a scheme for the regulation of the continental market. The people of the Philippines are the beneficiaries, not the victims of its provisions. The Act was found valid by a unanimous bench. In its opinion the Court refers to the Philippine Islands not as a territory, but as a dependency, *Ibid.* 314. It is recited, as so often it has been recited, that over the dependency the Congress has supreme legislative power and that "the national government may do for one of its dependencies whatever a

state might do for itself or one of its political subdivisions." *Ibid.* 317. But the opinion makes it clear that the Act in question "concerns itself only with the taxing power of the Federal Government," *Ibid.* 323; and the court insists that "the power of legislation" is limited only by the terms of the treaty of cession and those principles of the Constitution which by their nature are inherently invocable. *Ibid.* 313.

The case of *Hooven and Allison* v. *Evatt*, 324 U. S. 652, 65 S. Ct. 870, is still less in point. The court held that fibres in bales, whose point of origin was the Philippine Islands and which were being held in storage awaiting reprocessing were "imports" and therefore immune from the power of the state of Ohio to tax. In his opinion for the court, Mr. Chief Justice Stone was explicit that the holding was limited to the Philippine Islands. Mr. Justice Reed, *Ibid.* 679, dissenting in part, was afraid that the language applied was so broad as to be applicable to Puerto Rico. He protests against the departure from the rule of equality and against legislative discrimination in favor of Philippine as against domestic origin. Mr. Justice Black, *Ibid.* 686, in a dissent joined in by Douglas, Murphy and Rutledge, J.J., protests against the special privilege conferred by the use of the word imports in respect to merchandise from a country not yet foreign. And Mr. Justice Murphy, concurring in part, admits the departure from equality, but is tolerant of it because of the heavy responsibility—augmented by the war—which is ours in respect to the people of the Philippine Islands. In the *Hooven and Allison* case it seems impossible to find, even by inference, an authoritative support for the accused section.[101] And, inasmuch as Puerto Rico has long enjoyed an established government, no distinction between an organized and an

[101] It hardly seems necessary to consider the even more extreme case of Guam; for Puerto Rico is not Guam. A prohibition against the Congress playing favorites among citizens of the United States because of location, when the ends neither of public policy nor of national security, are sought, interferes in no way with our government's seeking, acquiring, and governing outlying military bases.

unorganized territory, can be conjured up to provide a sanction for section 207(b).

Thus the legislative, like all powers exercised by a responsible government, derives from the people and has its limits in the grant. As stated in *Puerto Rico* v. *The Shell Co.*, 302 U. S. 253, 58 S. Ct. 167, the theory upon which these territories have been organized "has ever been that of leaving to the inhabitants all the powers of self-government consistent with . . . certain fundamental principles established by Congress". Or, as stated in *Cases* v. *U. S.*, 131 F.(2d) 916, "Congress has full power to make all needful rules and regulations" subject only to such "constitutional restrictions upon the powers of that body as are applicable to the situation."

It is unnecessary to multiply these citations. The accused section is not "needful", it serves in no way to promote the welfare of the people of Puerto Rico. It does not move on the plane of rule and regulation, but on the very different level of legislative pleasure. Its concern is not "the territory and property" of the United States. Its operation is entrusted to the Secretary; in its administration the Government of Puerto Rico has no hand whatsoever. In fact, it in no sense takes effect upon "territory" belonging to the United States, but rather upon the people of Puerto Rico who are citizens of the United States. With the cession of Puerto Rico to the United States, the ancient liberties, reserved to the people against the Spanish Crown, were converted into the fuller and broader rights and liberties secured by our Constitution. Through the Foraker Act and the Organic Act as amended the people of Puerto Rico have come into the possession of all the rights, privileges and liberties of citizens of the United States living on the continent. The Constitution endows the Congress with no authority under the territorial clause or otherwise, even by the magic of such a word as "unincorporated", to make distinctions between classes of American citizens, because of residence on island or mainland. The

authority of the Congress over Puerto Rico and its people is limited, constitutional, responsible; and the power to impose the discrimination here complained of lies beyond the utmost reach of its lawful authority.

D. The Congress Is Endowed With No Power to Impose Upon the People of Puerto Rico, in Whole or in Part, a Colonial System, or to Reduce That Territory to the Status of a Plantation.

Thus the true character of the accused section stands revealed. It is no true part of the Act; it is an alien restriction grafted upon the statute. It is a fragment from the Old Colonial System, lifted out of its mercantile setting in the eighteenth and set down in the system of free enterprise in the twentieth century. A dominant instrument of that "commercial system" was the requirement that raw materials were to be sent from the plantations in which they were grown to the home country to be processed. Great Britain in particular was insistent that the islands of the West Indies upon which the cane was grown should not be permitted to process it and that the raw sugar should be transported to England to be refined.[102] Time has turned backward; the Congress has attempted to write a dominant provision of an exploitive system into the law of the land.

1. *The Attempt of the Thirteen Colonies to Escape the Restrictions of the Old Colonial System Created the Climate of Opinion Within Which the Constitution Was Framed.*

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[102] "The progress of the sugar colonies of France has been at least equal, perhaps superior, to that of the greater part of those of England; and yet the sugar colonies of England enjoy a free government nearly of the same kind with that which takes place in her colonies of North America. But the sugar colonies of France are not discouraged, like those of England, from refining their own sugar; and, what is of still greater importance, the genius of their government naturally introduces a better management of their negro slaves." Adam Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations. The Modern Library (that is the Cannan) edition, p. 553. It is of note that the treatise was published in 1776 and that the reference is to the Sugar Act of 1764.

The American Revolution was in large measure prompted by a protest against the Old Colonial System. Although in that glorious creation many groups played important roles, the dynamics came from the colonial merchants, whose opportunities for trade were blocked by the rigidities of the imperial economy.[103]

The Old Colonial System, which stirred our forefathers to rebel against Crown and to desert Realm, was a creation of the seventeenth and eighteenth centuries. It was a product of rising competitive nationalism—of Holland against England against Spain against France. In character opportunistic and practical, it found expression in a host of acts, statutes, ordinances and decrees, emanating from the King in Council, the Houses of Parliament, offices of national and local government. In time and in spite of much variation in detail, its host of expediencies were beaten into a somewhat articulate whole. It was erected through an alliance of the "political" with the "commercial" interest. The state found an ally in the commercial group, which helped to subdue local allegiance and to strengthen the Crown. The merchants needed the State to enlarge the orbit of their "adventuring" and to break open new, and to maintain old, markets. The individual became a citizen in a political, and even a military, economy. The country was to be made rich and in the opulence of His Majesty all loyal subjects were to share.

Strength became the great objective of national policy. The great states which had arisen were ready at all times to combat each other with blockades, tariffs and arms. War was an instrument of national policy and peace was an armed interlude between trade wars. In the minds of ministers of State the regulation of commerce was an exercise of the war power. Commerce and the military were complementary instruments of statecraft ready at all times for use. To a country like England, lacking in minerals, precious metals were of exaggerated value. Piracy was a

[103] Arthur M. Schlesinger, The Colonial Merchants and the Revolution.

bolder and more elementary form of commerce. Money was confused with capital and in general wealth was to be won at the expense of other nations.[104]

Thus the colonial policy—as those who made the American revolution meant it—was the weapon of a militant nationalism. At first the function of the colony was to discover, exploit and send home the precious metals.[105] As this hope vanished, it became the office of "the plantation" to produce staples which, within and at a profit to the mother country, could be processed or refashioned into wares of trade. In time the great objective of colonial policy came to be the creation of a self-sufficient economy as broad as, and coterminous with, the empire which was coming into being. In the fashion of their age, statesmen looked to Nature for the broad outlines of the system. But the art of politics was called upon to modify and reinforce the decrees of climate, resources and Nature's god. The use of such devices as duties, embargoes and navigation acts to barricade commerce against the foreigner is the negative side of the picture. The positive side is a series of measures designed to lock the metropolis and the dominions together in a territorial division of labor. In the processing, fabrication, and finishing of wares, England was to follow its natural bent; and each of the Colonies, in accordance with the decrees of Nature and of Parliament, was to make the most of the advantages given it.[106]

So by virtue of a variety of acts, ordinances and administrative orders, a single world-wide commercial dominion was to be all British. In this great economy, raw materials

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[104] The authoritative work is Eli F. Hacksecher, The Continental System; for an exhibit of contemporary thought see William Temple, Essay on Trade and Commerce and Thomas Mun, England's Treasure by Foreign Trade.

[105] A brief and colorful picture of the Old Colonial System as it was operated by Spain in the New World is to be found in the opening pages of Harlow Person, Mexican Oil.

[106] An uncompromising apologia for the colonial system is Philip Cantillon, The Analysis of Trade Commerce, Coin, Bullion, Banks and Foreign Exchanges (1757). An equally uncompromising attack on the system is Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, particularly Book IV, which is concerned with an analysis of rival commercial systems.

from the various overseas plantations were routed through the port of London where a toll was taken on the passing traffic. The various processes known to an age of handicraft as "manufacture" were in general reserved to the homelands; such trades were not proper to the plantations. The sugar islands of the Barbadoes and St. Kitt ranked far higher in the Colonial system than the colonies on the North American continent; and to them by law and Nature was secured a virtual monopoly of sugar and other of their tropical products. To Virginia and Bermuda was accorded an exclusive right to grow and sell tobacco, to insure which the people of the British Isles were forbidden to cultivate the noxious weed. In like manner exclusive concessions were made to the different colonies in respect to the growing of various staples. A concession, a real breach in the rising British economy, allowed the New England colonies to build ships.

The general economic pattern as it affected His Majesty's North American colonies, followed the prevailing trend. It aimed to secure to England a monopoly of manufacture, to establish in the plantations a market for its goods, and to allow the colonies to send raw materials in return. It denied opportunity to colonists in order that benefits to the people at home might result. In effect it set up a superior citizenship for the United Kingdom and an inferior citizenship for the English folk overseas.[107]

The break with England came largely as a result of the attempt of Crown and Parliament to strengthen the rigidities of the Old Colonial System. That system which was alike a commercial blockade of foreign nations and an articulate economic plan for the empire had always operated with an indulgence in benevolent negligence. Smugglers had been viewed as performing the social office of mitigating the severities of Acts of Parliament in the interests of a freer commerce; and private settlement between the King's Offices and the "gentlemen" of the trade

[107] William Graham Summer, Alexander Hamilton, p. 3.

had come to supersede judicial proceedings as a means of operating the revenue laws. The American colonies had grown and prospered largely because of the laxity with which the mercantile system had been administered.[108]

The attempt, after the accession of George III, to make the colonial system in fact what it was on paper was bound to stir up American resistance. It is needless here to recite the series of measures by which Great Britain attempted to stop the leaks and the indulgences in its political economy. As early as 1764, the Paper Money Act, making only coin of the Realm legal tender, became a menace to the trade of the colonies. In the same year the new Sugar or Molasses Act—to which the accused section bears so strong a resemblance—got in its licks. The old sugar act had never been enforced; the new act, although providing for a reduction of three pence the pound, was meant to be taken as a reality. In 1765 the Stamp Act was aimed not only at the collection of revenue but also at bringing all business documents within the cognizance of the public authorities. In 1767 came the Townshead Act, imposing duties on a long list of manufactured goods and in effect making Great Britain the only source of colonial supply. In 1770 all the duties were removed save the tax on tea, accompanied by a bold assertion of the authority of the Realm. The Navigation Acts, intended to secure to British bottoms a monopoly of the carrying trade, persisted and were tightened throughout this period. The closing of the port of Boston in 1775 is indicative of preventive measures employed to police the Old Colonial System. In addition to Acts of Parliament there were Orders of the King in Council and the rulings of the Board of Trade, in theory interpretative, in reality constituting a network of minor restraints tending to weave more closely the pattern of the mercantilist system. In the '60's, grievances were largely economic; as the decade advanced economics were

[108] Horracks, A Short History of Mercantilism; G. L. Beer, The Origin of the British Colonial System, pp. 467-72, 481-3, and Edgar S. Furness, The Position of Labor in a System of Nationalism.

commuted into political questions; by its end these issues concerned with the nature and operation of the British commercial system had become matters of high principle.

All of this was too much for the people of the colonies,[109] long accustomed to a careless, if not generous, tolerance. They had become too headstrong to accept the new and rigid discipline which Crown, Ministry and Parliament was attempting to impose on them. Other scourges had driven groups into rebellion; the attempt to regiment their trade to the strictures of the Old Colonial System induced "the commercial interest" to join the revolution. And eventually, by "the unanimous declaration of the thirteen United States of America, in Congress." It was resolved no longer to endure "the patient suffering of these Colonies," and to recognize "the necessity which constrains them to alter their former System of Government."[110]

2. *The Constitutional Convention, After Adequate Deliberations, Rejected a Colonial Status for the People of Any Territory Belonging to the United States.*

The separation of the thirteen colonies from Great Britain involved an economic as well as a political revolution. Independence meant that Acts of Parliament and interpretations of the Board of Trade were no longer binding. As a result that mosaic of law by which the colonial system had operated no longer had power to compel action on this side of the ocean. Peace brought the task of filling the void left by the departure of the established economic order. The Continental Congress was not ready for a major venture into the regulation of commerce. The sev-

[109] S. E. Morrison, Documents of the American Revolution; Morrison and Comanger, The Growth of the American Republic; John C. Miller, Origin of the American Revolution.

[110] Thomas Jefferson, Summary View of the Rights of British America, is to be found in any edition of the Works. It appears both in the selected writings (Modern Library edition) and in Saul Padover, editor, The Complete Jefferson. An illuminating gloss is Edmund S. Morgan, Colonial Ideals of Parliamentary Power, 1764-1766, an article in a late issue of the William and Mary Quarterly.

eral states were disposed to take their newfound independence seriously. As sovereigns each was inclined to fit itself out with an economy of its own. As victims they had condemned the specific strictures of the Old Colonial System; yet it was not easy for them to rid their minds of an economy which was mercantile in character. A spirit of competitive localism found expression in the imposition of taxes and the regulation of trade. Boundaries between states became political frontiers. Angry quarrels sprang up between New York and Connecticut and New Jersey. State tariffs provided retaliatory measures. In course of time New Hampshire, Massachusetts, Pennsylvania, Virginia, Georgia and the Carolinas were all involved in trade disputes. State accused state of levying tribute upon its neighbors by imposing duties upon its own distinctive products. The complaint was general that the maritime states were regulating their ports to the detriment of the interior. The nationalism of the Old Colonial System reappeared in thirteen miniature copies.

A move toward a more perfect union was inevitable. Complaint was general, especially on the part of the commercial interest; and "committees of correspondence" helped to weld local groups into a national bloc. As 1785 came to an end, Virginia proposed that commissioners from the various states meet to examine "the trade of the United States . . . and the said states" and to discuss "how far a uniform system in their regulation may be necessary to their common interest and permanent harmony."[11] But by the time the commissioners met in Annapolis in September, 1786, a host of substantial citizens had come to the conclusion that it would be futile to vest control of commerce in the Congress of the Confederation and that such a power was to be entrusted only to a government "so branched, changed or altered" as to be able to wield it. For due to Shay's rebellion, and the state of the nation of

[11] Jonathan Elliott, The Debates in the Several State Conventions on the Adoption of the Federal Constitution, etc., I, p. 115.

which it was the obvious symptom, the prestige of the Congress had reached a new low. The delegates to Annapolis were by their instructions confined to a consideration of commerce. Since it appeared that "the power of regulating trade" was "of such comprehensive extent" as to involve "the general system of the Federal Government," an effective attack was bound to require "a corresponding adjustment of other parts of the federal system."[112] To meet this larger problem of repairing the breach in the economy occasioned by the separation from Great Britain, the Annapolis delegates proposed a convention with representatives from all the states "to meet at Philadelphia on the second Monday in May," 1787. It was hoped by Mr. James Madison that "so select a body would devise an adequate remedy for the existing and prospective evils so impressively demanding it."[113] The very existence of "the American experiment" was at stake.

It is now commonplace that in the Convention of 1787 the several "interests which make up the commonwealth"[114] were to the front. The clash of states and of sections, even in respect to political questions, were largely economic in character. It is of significance that the debate on political issues, such as representation in Senate and House, broke early in the session, was attended by some heat, and touched off economic issues. The economic issues were then taken up, and after adequate deliberation disposed of. When attention was again turned to political questions they were rather quickly settled. Mr. Madison, conscious that "all civiled societies" are "divided into different Sects, Factions and Interests," as they happen "to consist of rich and poor, debtors and creditors, the landed, the manufac-

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[112] Elliot, I, p. 118.

[113] From a rough draft to a preface to Madison's Notes on the Convention, Max Farrand, The Records of the Federal Convention of 1787, III, 539-551.

[114] In his Journal, Mr. Madison makes much of the pitting of interest against interest. Mr. Charles Pinckney, of South Carolina, resolved "the people of the United States" into the "three classes" of "professional men", "commercial men" and "the landed interest". Note that laborers and those engaged in subsistence agriculture are omitted.

turing" and "the commercial interest"[115] was intent upon such political arrangements and such distribution of power as would not disturb the unity and harmony of the body politic. In this attempt to create a balanced system and to prevent any interest from overriding another interest in the new republic, the Convention moved forward. In a number of ways the colonial question provoked vigorous debate.[116]

It was involved in the over-all commercial arrangement decreed by the Convention. As the urge which prompted the gathering was to escape the crisis whose roots were economic, so the drive was to set in reverse the movement towards industrial fragmentation. A single "customs union"—we today would say national economy—was to be created and this national economy, not limited to the states, was to be as comprehensive as the land. There is hardly a provision of the Constitution which is not touched by this insistent drive. In shaping the structure of government a careful balance was devised between sections of the country with their distinct economic interests. It was impossible, in view of difference in area, wealth and population, to make citizenship mean the same thing in all the states. But, where political rights were somewhat unlike, the sting of unequality was taken away in the economic realm. For, thanks to the Fathers, the people were free to move across state lines in search of the main chance, and goods were free to cross political boundaries in search of wider markets. Even the "judicial power of the United States" was made responsive to this nationalistic urge. A primary reason for the creation of the Supreme Court was to settle controversies between the several states arising out of commerce; the function of disposing of boundary controversies came up late in the session.[117] In general, however, the establishment of a framework within which a national

[115] The Journal for June 9th.

[116] These debates are fully presented in Max Farrand, The Records of the Federal Convention of 1787.

[117] Madison's Journal.

economy might come into being was focused upon three questions, each of which found its answer in an appropriate clause. And, in respect to each of these, the colonial question was clearly in mind.[118]

The Commerce Clause—The first of these questions was the control of "commerce", a word which in late eighteenth century usage stood for the market, in distinction to the domestic or subsistence economy. The history of the writing of the commerce clause, from its inception in the Randolph resolution, granting to the federal government power in respect to matters which lay beyond "the competence of the several states" to its eventual formulation in the power of the Congress to regulate commerce with "foreign nations, among the several states and with the Indian tribes," has been often written both in histories of the Convention and in the opinions of this Court, and need not be repeated. For present purposes, it is enough that the debates were concerned largely with form and detail. The drive was to level domestic tariff walls, to prevent trade wars along boundary lines, to stop for all time the cutting of the economy to the political pattern set by the several states.[119]

The Taxing of Exports—The second is the question of the grant or denial of the power to tax exports. Although it provoked a major battle, it has had far less attention from the historians and the courts. The tax on exports had been a dominant weapon of the old commercial system; it was a well-practiced way of collecting revenue at the expense of the foreigner. When the matter first came up it appears that there had already been a great deal of discussion and an informal agreement had been reached that there was to be no tax on exports. When next the question was raised, Mr. Gouvernour Morris, standing on current

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[118] The traditional approach to the Convention of 1787 has been so dominantly political that the superb craftsmanship of the Fathers in the economic realm has been largely overlooked.

[119] The practice is in vogue today. Thus Bolivia by an export tax imposed upon tin collects a substantial share of the expense of operating its government from consumers in the United States. British and Dutch Malaya, through natural rubber, exercise a like power of taxing persons outside of their dominions.

realities, stated that "all countries having peculiar articles tax the exportation of them"[129] and insisted that "the state of the country, also, will change and render duties on exports" such as "skins, beavers, and other peculiar raw materials politic in the view of encouraging manufacture." This last note provided a theme to the members from the rising manufacturing interest. Resting upon orthodox mercantile theory, it put the United States, particularly the New England States, in the role of Great Britain. If the new republic was to be fitted out with its own nationalistic economy, not only must manufacture be encouraged, but a division of labor must be effected within the federal union between the production of raw materials and the fabrication of finished wares. To that end the old device of a tax on exports—perhaps their prohibition in particular instances—was in order. For if raw materials were allowed to be exported, it would be at the expense of the processing industries of the nation, and as a result they might be unable to carry on for lack of supply. In the spirit of competitive nationalism it was argued that an export tax "on lumber and on livestock" could be made to fall heavily upon the West Indies; and, "in case of a dearth . . . we may extort what we please." On a higher level, Mr. James Wilson insisted that "to deny the power is to take from the common government half the regulation of trade." Mr. Madison thought that, "even though it may not be expedient at present," a tax on exports "may be so hereafter." Mr. Fitzsimmons, looking to the time when the United States should become a manufacturing country, did not want "to foreclose a future necessity." The opposition to the grant of the power to tax exports came largely from the Southern states. They wanted to be secure in overseas outlets for their staple crops and were unwilling to entrust to the general government any power to drive a barrier between exports and their European markets. They were for the time at least quite satisfied with the position which they

[129] Madison, Journal for August 28, September 15.

had occupied before the separation from England. They were fully content to send their staples abroad, knowing that they were to be paid for in tropical products and manufactured goods. Thus, after prolonged debate, "security" for the staples was voted by Massachusetts and all the states south of Maryland. And thus from mixed motives of interest and of theory a dominant aggressive weapon of the Old Colonial System was given up.[121]

State Taxation of Imports—Again, in fixing the place of the states in the federal union, the colonial question was raised. It came to life in the discussion of the proposal forbidding any state to "lay duties on imports or exports." As a merchant and a Virginian, Mr. George Mason was unwilling to have his state surrender its power to shape its commercial destiny; for "particular states might wish to encourage by import duties certain manufactures, for which they enjoyed material advantages." Mr. Madison could not agree; for the encouragement of manufacture by separate state action required duties not only on imports from abroad, but also from other states of the Union; and the result would be the perpetuation "of all the mischiefs experienced from the want of a general government over commerce." To this end Mr. Clymer was of opinion that some such prohibition was necessary "to prevent the Atlantic States from endeavoring to tax the Western States." He was certain that "the encouragement of the Western Country was suicide on the old states." He added that "if states with different interests cannot be left to regulate their own manufacture without encouraging the interests of other states, it is a proof that they are not fit to compose one nation." And Mr. King objected that to strip the states of power over imports and exports "would too much interfere with the policy of states respecting their manufactures." But his views did not prevail; the current reality of tariff walls maintained by the several states was

[121] Madison, Journal for August 16, 21. The clause as eventually it came to rest in the Constitution reads, "No Tax or Duty shall be laid on Articles exported from any state" (Article I, Section 9).

too obvious for that. So, with Massachusetts and Maryland alone in dissent, the delegates proceeded to adopt the provision.[122] In this they were with Mr. Madison who was "more and more convinced that the regulation of commerce was indivisible and ought to be under one authority."[123]

Nor did the matter stop there. What the states could not do directly, they were not to be allowed to do by indirection. They were not to be permitted to employ inspection laws and kindred devices to impose state tariffs. A motion by Mr. Roger Sherman, a flurry of debate on the floor, a formulation by the Committee on Stile, a further indulgence in debate, and it was agreed that "no state should, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports shall be for the use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress." The Constitution, Art. I, Sec. 10. From the temptation to levy revenue—and in its name to accomplish other objectives—through the imposition of customs duties, the States were forever delivered.

The Colonial Question—By such provisions dominant instruments of the Old Colonial System were rejected. The Congress was denied the power to employ an export tax and thus to exploit other peoples in the sale of commodities peculiar to us. As a government of delegated power, the Congress was granted no authority to impose import or export duties upon any state to the advantage of its people or to the detriment of the people of other states. A like prohibition against import and export taxes was imposed upon the states and guarded against evasion. It is through

[122] The members of the Convention clearly realized—as the debates disclose—that the prohibition of an export tax meant purchases of manufactured goods from abroad rather than from the Atlantic States and that it was a serious hazard to the erection of a new England as the metropolis in any American colonial system.

[123] Madison, Journal for August 28, September 15.

these clauses that all the territory belonging to the United States became fused into a single national economy. In this economy there was to be equality of opportunity; the legislative fiat, whether federal or state, was not to be used to secure industries to one state at the expense of others. The Atlantic States were not to be allowed to become a new England, which was to enjoy an exclusive right to manufacture at the expense of the states to be carved out of the great Western country which as a result would be limited to the production of raw materials. A state, a group of states, a section was not to be granted privileges withheld from others of its kind. It is significant that the territories were brought into the debate, and that all measures were turned down which imposed, or threatened to impose, a colonial status upon them. The Constitution completed the work of the Revolution. A generation which fought to escape the Old Colonial System was unwilling to impose its severities upon their fellow countrymen who might venture forth to do business in a territory.

This short account shows how incongruous is the position of the accused section in the scheme of trade relations between the island and the states. Although it runs counter to the treaty of cession and invades the civil liberties of American citizens living there, it would logically have been possible never to have brought Puerto Rico into our customs union, or national economy. In that event, the Congress would have been able to levy tariffs upon—or even to exclude from the continental market—Puerto Rican products. But, in that event Puerto Rico would be equally at liberty to impose duties or even embargoes upon goods arriving from the mainland. The powers of the Congress and of the insular legislature would be identical, as they were between Spain and Puerto Rico under the instrument of 1897. But the Congress has not accorded to the island—and the insular government has not asked for—any power to regulate goods coming in from the several states. The Congress asserts the power of laying an embargo against admittance

to mainland markets of Puerto Rican products. Yet it extends to the island territory no reciprocal rights. It claims the authority, by admitting or excluding its products, to regiment the economy of Puerto Rico to the benefit of the mainland, or even of a special interest within it. The one-way assertion of power to shape insular destiny goes back of the arrangements decreed by Spain for Puerto Rico. It marks a reversion to the Old Colonial System.

The facts of the American Revolution and the proceedings of the Constitutional Convention are not mysteries which have been veiled from the courts. In cases before them, particularly cases concerned with the rights of citizens of the United States living in the territories, these matters have been repeatedly recalled. In *Scott v. Sanford, supra,* Mr. Chief Justice Taney states categorically that "there is certainly no power given by the Constitution to the Federal Government to establish or maintain Colonies, burdening on the United States or at a distance, to be ruled and governed at its own pleasure" (*ibid.* p. 718). He goes on to say that a new territory "is acquired to become a state, and not to be held as a colony and governed by Congress with absolute authority." And to relate the Constitution to the struggle out of which it had grown, rhetorically he asks (*ibid.* 744), "Could it have been the purpose of Washington and his illustrious associates . . . to reestablish in the Constitution of their country that fort which had been prostrated amid the toils and with the sufferings of seven years of war?" In *Downes v. Bidwell, supra,* Mr. Justice Harlan, in a part of his dissent concerned with an issue on which the Court did not divide, insists that "the idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces—the people inhabiting them to enjoy only such rights as Congress chooses to accord to them—is wholly inconsistent with the spirit and genus, as well as with the words, of the Constitution."

E. The Accused Section of the Act Runs Directly Contrary to the Intent of the Constitution, to Our Obligations Assumed by Treaty, and to the Spirit of the Law of the Land.

We have always understood that the Constitution was an instrument to serve the general welfare, not a strait-jacket within which the federal political order and the national economy were to be confined. The members of the Convention of 1787, in the words of Mr. Justice Moody, dissenting, in *Howard* v. *Illinois Central Railroad Co.*, 207 U. S. 463, 28 S. Ct. 141, 148,[124] "were not content to frame a system of laws sufficient for the present moment which might, in a few years, become unsuited to, or inadequate for, the needs of the people." Accordingly, they chiseled constitutional power into propositions flexible enough to be adapted to the variety in circumstance which time and change were certain to bring. Their work left little room for an antithesis between national necessity and constitutional command.

If, however, the specific principles of the Constitution are so rigidly read as to be compelling the intangible values are not to be overlooked. The intent of that instrument, the obligations we have assumed by treaty, and the spirit which from days of old had attended the weaving of the law of the land are not to be neglected. Where it is adjudged that the Constitution allows discretion, they present sanctions to guide the exercise of that discretion. Where, as here, the Constitution furnishes no warrant for the enactment of the accused section, they offer substantial reasons against endowing the Congress with such a power. No elaborate argument is here to be presented in support of the propositions below; but, in the manner of the several opinions in *Hooven and Allison Co.* v. *Evatt*, 324 U. S. 652, 65 S. Ct. 870,

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[124] These cases are commonly referred to as the "Employers' Liability Cases." This part of the Opinion is not concerned with the question on which the Court divided.

the propositions below—without detailed exposition—are put forward as auxiliary reason for the invalidity of Section 207(b).

1. *The Accused Section of the Act Encounters Perils From Many Specific Clauses in the Constitution.*

It has been shown that the accused section rests squarely upon no power delegated to the Congress. It has likewise been pointed out that, in its departure from the rule of equality, it violates the requirement of due process and invades rights reserved to the people. In addition, it encounters perils—and provides open questions—in respect to other clauses of the Constitution.

In fact it skirts the very limits of constitutional authority. At the threshold it meets a challenge in the Preamble of the Constitution. It imposes an economic handicap upon the people of Puerto Rico, not laid upon the people of the mainland; it thus tends to prevent, rather than to form, a more perfect union. It takes from one, and confers upon another, group of American citizens economic opportunity; it can therefore scarcely be held to establish justice. Among the citizens living in Puerto Rico it stirs up grievances against the United States in Congress assembled; thus it can scarcely be said to promote domestic tranquility. By abridging the rights of the people of Puerto Rico, it fails to secure the blessings of liberty to an insular group among ourselves and our posterity. In this and other ways, it can best be described as setting the Preamble to the Constitution in reverse.[128]

In terms of the text itself, it runs directly contrary to the intent of many specific constitutional provisions. It is written (Article I, Section 8) that "the Congress shall have Power . . . to establish an uniform Rule of Naturalization." By naturalization the citizens of Puerto Rico become citizens of the United States. It is by the rule of naturaliza-

[128] The Government of Puerto Rico is disposed to argue that "the good neighbor policy" should begin with our own insular possessions.

tion that persons born in a foreign country come into the same status as persons native to the several states. The accused section violates the uniformity of the rule by admitting natives of Puerto Rico into a limited citizenship. It is written (Article I, Section 8) that "the Congress shall have Power . . . to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries." The Fathers were thoroughly familiar with the evils which had attended the royal grant of monopoly. In setting up a government of limited powers, they were careful not to bestow upon the Congress power to issue grants of monopoly. Its context makes it evident that this power to grant, for limited times, exclusive rights to authors and inventors was written as a special exception in the absence of power to grant monopolies. The accused section—save for the 126,033 tons allowed—confers a grant of monopoly upon the coast sugar refiners, which operate in a lockstep so close as in effect to constitute a monopoly. See *Sugar Institute* v. *U. S.*, 297 U. S. 553, 56 S. Ct. 629.

It is written (Article I, Section 9) that "no preference shall be given by any Regulation of Commerce or Revenue to the Ports of one state over those of another." The word "state" may or may not be used to comprehend a territory; the case law does not settle this question. But that the challenged provision operates in such a way as to prefer continental to insular ports in the shipment of refined sugar admits of no doubt. It is written (Article I, Section 9) that "no Tax or Duty shall be laid on Articles exported from any State." It is here more positive that the word "state" is to be read as comprehending a territory. This prohibition to the Congress of levying an export tax helps to make way for the creation of a truly national economy. Puerto Rico cannot maintain a self-sufficient economy of its own; its very survival depends upon linkage with the continental economy. The word "export" is to be read in terms of the

function the prohibition is designed to effect; if an export tax is invalid, an embargo, surely an embargo as nearly complete as that imposed upon direct-consumption sugar, is invalid. The three clauses—commerce, federal prohibition of export taxes, state denial of customs duties—are intended to establish a single national economy as broad as "the land". It is obvious that the accused section runs directly contrary to the economic theory which animates the Constitution.

All along the line, the Constitution consistently interposes its challenge to all attempts to set up and operate trade barriers within the domestic economy. It is written (Article VI) that "this Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." It is written (Article IV, Section 1) that "full Faith and Credit shall be given in each State to the public Acts, Records and judicial proceedings of every other State" and (Article IV, Section 2) that "the citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States." Again (Article III), "the judicial Power" is extended "to all cases in Law and Equity, arising under the Constitution, the Laws of the United States and Treaties made . . . under their Authority." The prohibitions against mercantilist restraints are explicit; the security against trade barriers is to operate for all citizens of the United States alike; the judicial power is there to be invoked, in defense of rights secured by the Constitution and against arbitrary interference by the government with freedom of trade. All of these prohibitions are a little later tied together by the injunction (Amendment, Article V) that "no person shall . . . be deprived of life, liberty, or property without due process of law", an injunction which in enlarged language was somewhat later (Amendment, Article XIV, Section 1) imposed upon the several states. Thus Section 207(b) of the Act, which abridges the liberty of citizens for no other reason than the advantage of other

citizens in the same industry has to run the gauntlet of many specific prohibitions of the Constitution.

2. *The Accused Section Cannot be Reconciled with Obligations which the United States has Assumed by Treaty through the Treaty of Paris.*

So far as we can discover, a conflict between a statute such as the accused section and obligations assumed by treaty to protect a body politic in its civil liberties has never been resolved by this Court. At this place, therefore, no more will be done than briefly to recite the conflicting considerations.

As sounding in contract, the status of a treaty is clear. A treaty involves as parties two countries, and, therefore, is supposed to fix the limits within which a single country is free to legislate. To the same effect is the Federalist, LXIV, which gives to a provision in a treaty preference over an Act of the Congress. The idea that a subsequent Act of the Congress might abrogate a treaty, or a provision thereof, was evidently not contemplated by John Jay, advocating the adoption of the Constitution—and presumably not by the framers of the Constitution.[128]

The case law, however, seems to read to the contrary. From it three propositions are to be drawn; but no one of the three has the support of an exaggerated weight of author-

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[128] "Others, though content that treaties should be made in the mode proposed, are adverse to their being the supreme laws of the land. They insist and profess to believe, that treaties, like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them absolutely, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and, consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period or under any form of government." The Federalist, No. LXIV.

ity. The first is that the treaty, if later in time, will control. *Whitney* v. *Robertson*, 124 U. S. 190, 8 S. Ct. 456; *Horner* v. *U. S.* 143 U. S. 570, 12 S. Ct. 522. The second is that a later statute will take precedence over an earlier provision in a treaty. In such an instance, the offended country has access to diplomatic process for the redress of its grievances.[127] *Cook* v. *U. S.*, 288 U. S. 102, 53 S. St. 305.[128] The third is that the courts will try to construe treaty and statute in such a way as to save both.[129] The one will not be deemed to repeal the other unless they are in absolute conflict. *U. S.* v. *43 Gallons of Whisky*, 108 U. S. 491, 2 S. Ct. 906, 908.[129] The cases are not sufficient in diversity of situation to free these holdings from the concrete situations before the court and to convert them into general rules of law.

Such holdings seem strangely alien to the instant case. In the Treaty of Paris, Spain relinquished its sovereignty over Cuba, to be exercised by whatever power came into the succession. In quite different wise, it ceded to the United States what—and only what—it possessed. It did not—in fact it could not—cede to the United States any power to deny, abridge, or withhold the ancient liberties of the people. For by the Spanish Constitution of 1876 and the Constitution proclaimed for Puerto Rico in 1897, it was acknowledged that these civil rights belonged—and from days of old had belonged—to the people and lay in a realm untouched by the sovereignty of the state and made secure against its trespass. This acknowledgement of a reserved province took the form of a social compact. The state's authority—its territorial dominion, its public property, such

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127 Here, resort to diplomacy touches off a "diplomatic question" quite analogous to the "political question" of Constitutional law.

128 " . . . . if the two are inconsistent, the one last in date will control the other." *Whitney* v. *Robertson*, 124 U. S. 190, 8 S. Ct. 456, 458. It hardly seems necessary here to set down a complete catalogue of the cases, since those not mentioned break no new ground.

129 "When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; . . . " *Whitney* v. *Robertson*, *supra*. "The terms of Congress are always to be construed so as to conform to the provisions of a treaty, if it be possible to do so without violence to their language." *U. S.* v. *45 Gallons of Whisky*, *supra*.

as roads, harbors, buildings—it could and did transfer. The civil rights of the people, like the private property belonging to them, whether realty, chattels or intangibles, the Crown could not—and did not—cede to the United States. In the relations between the United States and Puerto Rico, this elementary fact that the liberties of the people were not ceded has not been forgotten. Precedence has sometimes been given to Spanish over Anglo-American statement of rights; the Spanish liberties to a considerable extent have been commuted into the traditional version of our legal system. But they have not been denied or made subject to the pleasure of the Congress.

The civil rights, however, of the People of Puerto Rico do receive explicit mention in the Treaty of Paris. The civil rights of the several territories ceded are left to be "determined" by the Congress of the United States (Article IX). This article attests both the existence of these rights and their recognition by the two national parties to the agreement. The key word here is, in the infinitive, "to be determined" and it is hard to discover a better term with which to convey the intended meaning. The word "to determine" is in the Spanish text "determinare"—and is of Latin origin. Its etymological meaning is to fix or mark out the limits of that to which it relates. In Spanish it has been held rather strictly to its primitive meaning. In English it has been allowed to stray; yet, in its departures, it has never wandered so far as to mean "created by", "endowed with content through" or "to be held at the pleasure of". For the Congress could fix, or write down in precise terms the limits only of an area which was recognized. Context and history, reinforcing definition, make it clear that as used in Article IX "to determine" means to spell out, to reduce to precise terms, to formulate in detail.

Such a reduction of civil rights to precise terms was necessary; and it could not be effected by the treaty makers. The territories ceded by Spain to the United States were widely scattered; their populations were dissimilar in race,

language, traditions, economies. They occupied distinct places in the Spanish Empire; their people were very differently seized of civil liberties and of political rights under the Peninsular government. A single formulation could not have been made to fit cases as dissimilar as those of the Philippines and Puerto Rico. The civil rights for each of the territories which Spain gave up would have to be determined separately and probably could not be determined all at once. The task, not of creating but of adapting a bill of rights to the culture, desires and necessities of an insular people was not for diplomacy. The treaty could recognize these rights and point the way; their specification had to be left to the Congress. The rationale of elevating a later statute over an earlier treaty does not apply to the instant case. Moreover, Puerto Rico was not a party to the treaty; it is rather, at least in technical terms, to be described as a third party beneficiary. As an injured party it has no access to diplomatic channels. For the redress of its grievances, it has no recourse save to the courts.

But that the power of the Congress over Puerto Rico has been limited by the Treaty of Paris seems to be recognized.[130] To citizens of Puerto Rico, by the terms of the Foraker Act, writs of error and appeals were to be allowed from local courts to the United States Supreme Court "in all cases where the Constitution of the United States or a treaty thereof or an Act of Congress is brought into question" (Act, Section 35). In respect to the Philippines—the argument is even stronger in respect to Puerto Rico—this Court in an unanimous opinion has held that "the power of legislation" is "limited . . . by the terms of the treaty of

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[130] The exchange of views between the United States and Spain, in respect to the civil liberties of the persons in the ceded territories, is covered in: Duque de Almodóvar del Rio, *Documentos presentadoes a las Cortes en la Legislatura de 1898 por el Ministro de Estado (Tratado de Paz con Estados Unidos—Negociaciones diplomaticas deade el principio de la guerra hasta la firma del protocolo en Washington)*, Imprensa Rivadeneyra, Madrid 1899; and the collection by Clarence Edwin Carter: *Territorial Papers of the United States*, Government Printing Office.

cession." *Cincinnati Soap Co. v. U. S.*, 301 U. S. 308, 313-314, 57 S. Ct. 764, 767.[131]

If the two stood alone, the relation of the accused section to the Treaty of Paris would present an open question. But it happens that the civil rights here invaded have a more fundamental basis than the Treaty of Paris or even the Organic Act as amended. Therefore these considerations respecting treaties are presented, not as independent, but as auxiliary arguments for the lack of authority in the Congress to enact the accused section.[132]

3. *No Power to Strip One Group of United States Citizens of the Right to Compete and to Vest the Business in Another Group of Citizens in the Same Industry Has Been Delegated to the Congress by the Constitution.*

It is an axiom, under our system of government, that absolute, unqualified, irresponsible power belongs to none of its departments. As with the executive and the judiciary, the power of the Congress is limited. Nowhere in the enumeration of its powers is authority granted to the Congress to prefer one group in an industry over another, to restrain the trade of certain citizens to the advantage of other citizens or to vest a preferred interest with property rights in the market. Nor is such a power to be spelled out by recourse to other powers. To make either the commerce or the territory clause provide a sanction for the accused section, it is necessary to argue that such grants are absolute. In respect to the territories this contention has been answered above (Section C). An argument for the absolute character of the commerce power is too contrary to judicial usage seriously to be put forward.

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131 It is also to be noted that at the time of the Treaty of Paris, the Crown of Spain did not possess—and, therefore, could not cede to the United States—the power to regulate trade between the island and the sovereign country. By the Puerto Rican Constitution of 1897 the regulation of commerce between Island and Peninsula was a matter for joint action.

132 The accused section runs directly contrary alike to the oft-professed obligations of the United States and to the general principles in respect to backward or depressed areas as put forward in the Atlantic Charter.

Escape, then, is to be had only by contending that, whereas in regulating commerce among the several states, the Congress must legislate within the framework of a responsible government, in regulating commerce between the continent, and an organized territory, it can act in a dictatorial manner. As sheer logic it is impossible to see how a single provision can give expression to a constitutionally limited power of the Congress as it affects commerce among the several states and an unconfined power as it affects the commerce between the island and the states. The power in question is not in words conveyed; to discover the implication involves verbal jugglery and logical lapse.

If, however, such a power has not been delegated, clearly it has been withheld; and, if withheld, all bothers about whether it is limited, and what its limitations are, end. For it is written (Amendment, Article X) that "the powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." A number of "the powers" so reserved to the people are specified in the instrument itself. But the rights of the people do not have to be reserved in concrete language; upon that matter the silence of the Constitution speaks plainly. For it is written (Amendment, Article IX) that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others reserved by the people." In support of this contention, it hardly seems necessary comprehensively to explore case law. Here it is enough to set down a few representative holdings from the reports.

It was in construing and applying the territory clause that in *Scott* v. *Sanford*, 19 Howard, 393, 633, Mr. Chief Justice Taney based his whole argument on the proposition that "this government was to be carefully limited in its powers, and to exercise no authority beyond those expressly granted by the Constitution or necessarily to be implied from the language of the instrument." The power of the Congress to vest a favored group with market rights is not

to be found in the Constitution and certainly it is not "necessarily" to be implied from its language. He continues (*ibid.* 719) "the power of Congress over the person and property of a citizen can never be a mere discretionary power under our Constitution and form of government." The Congress "cannot, when it enters a territory of the United States, put off its character and assume discretionary or despotic powers which the Constitution has denied to it." He continues, "an Act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular territory . . . could hardly be dignified with the name of due process of law." The only justification presented for Section 207(b) is that the Congress can discriminate because the favored group carries on in the States while the unprivileged group operates in a territory. The language quoted has exactly this situation in mind. The powers of the Congress "over person and property", necessary to sustain the accused provision is, in the words of Mr. Chief Justice Taney, "not only not granted to Congress but are in express terms denied."

The law as thus promulgated has down the decades remained the law of the land. The Congress has in respect to newly-ceded territory been allowed a zone of tolerance for "temporary expedients." It has been permitted an area of discretion in the "adaptation" of the laws of the United States to cultures and conditions which were never in contemplation. In the realm of device and procedure, leeway has been the rule; but it has remained settled law that in the government of a territory the Congress cannot exercise a power withheld by the people. "The status", says Mr. Justice White, in *Downes* v. *Bidwell, supra,* 790, "of a particular territory has to be taken into view when the applicability of any provision of the Constitution is questioned;" but, following Mr. Chief Justice Taney, he insists that "when the Constitution has absolutely withheld from the government all power" no such inquiry is necessary. He

holds that "there are general prohibitions in the Constitution in favor of the liberty and property of the citizen, which are not mere regulations as to the form and manner in which a conceded power may be exercised, but are an absolute denial of all authority under all circumstances." Here he distinguishes clearly between "the two characters" of restrictions—those which "regulate a granted power" and those which "withdraw all authority on a particular subject." Thus he sharply separates the power to prescribe "needful rules and regulations" from the "absolute withdrawal of power which the Constitution has made in favor of human liberty."

In respect to the fundamental rights represented by the verbal shorthand of "life, liberty and property", Mr. Justice White is in no doubt. The prohibition against their invasion "is not confined to the states . . . but extends to the whole territory" over which the Congress has power to legislate. "In possession of these rights the citizens of a territory are on the same footing as citizens of the states." In respect to these liberties "there is a total absence of power everywhere within the dominion of the United States"; and the Constitution guards the people of a territory "as firmly and plainly" against "any inroads which the general government might attempt under the plea of implied powers" as the citizens of a state. As Mr. Chief Justice Fuller has summed the matter up in a dissent in *Late Corporation of the Church of Jesus Christ of Latter Day Saints* v. *U. S.*, 136 U. S. 1 10 S. Ct. 792—a statement quite in accord with the opinion of the court—it is of "vital consequence that absolute power should never be conceded as belonging under our system of government to any one of its departments. The legislative power of Congress is delegated and not inherent and is therefore limited."

The courts have been insistent that to strike down such a denial of the liberties of men, as is presented by the accused section, there is no need to recite chapter and verse.

These are, as Mr. Justice White well puts it in *Downes* v. *Bidwell, supra*, "inherent although unexpressed principles which are the basis of all free government" which "cannot be with impunity transcended". Even in cases where "there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed although not expressed in so many words". In the case of *The Late Corporation of the Church of Jesus Christ of Latter Day Saints* v. *U. S., Supra*, Mr. Justice Bradley, speaking for the Supreme Court, states that in legislating for the territories, the Congress would doubtless "be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments." And the opinion insists that "these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its power, than by any express and direct application of its provisions." In *Kepner* v. *U. S.*, 195 U. S. 100 24 S. Ct. 797, Mr. Justice Day, speaking for the Supreme Court, holds that "the power of Congress to make rules and regulations for territory incorporated in or owned by the United States ... must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution". In this domain the frame of judicial reference is not only to specific provisions in our fundamental instrument of government but also to the absence of all power and to the spirit and the glorious tradition of our system of law.

4. ***The Necessity for Puerto Rico to Find a Way through Which a Decent Standard of Life May Be Maintained by Its People Provides a Practical Reason for Denying the Validity of the Accused Section.***

In passing the accused section, the Congress did not act

in the dark. A number of congressional inquiries have laid bare the plight of the Island and its people. Without exception, they have shown the tragic and insistent pressure of population on limited resources. Crowd the people of all the world into the Continental United States and the population density is hardly any greater. Subtract our timber, our minerals and our fuel and power resources and the environment becomes comparable. The incidence of this density in malnutrition, lack of adequate housing, denial of educational facilities, the prevalence of disease is a matter of common knowledge. Puerto Rico is fighting gallantly against poverty, stunted lives and the evils which attend them. The Congress, lapsing from the sense of responsibility which usually it has acceded the Island, seeks to close the door to opportunity.

The issue before this Court is a matter of life and death to Puerto Rico. Its economy, its chance at industrial development, its capacity for advancing the standard of life of its people, hang on the decision presently to be made. The Government of Puerto Rico can say in all sincerity that here is as serious a matter as could come before a court of justice. For the issues reach far beyond the immediate question presented by the accused section of the Act. They involve alike the political status of Puerto Rico, the position of that territory in our federal system, and the relation of the insular to our national economy.

For if it should be held by this Court that the Congress has the power to fix a maximum for the number of tons of direct-consumption sugar which refiners in Puerto Rico may market in the Continental United States, it follows as of course that the Congress has the power completely to exclude sugar refined in Puerto Rico from the mainland market. If such an unrestricted power belongs to it, the Congress has adequate authority to decree the amounts of rum, plywood, textiles, chinaware, glass bottles, furniture and soap of island fabrication which can be marketed upon

the mainland. And if the Congress may fix maxima in respect to each of these and all other fabricated or processed goods, it possesses the power, at its pleasure, to exclude any or even all articles of merchandise produced in Puerto Rico from the mainland market. The rights and liberties at stake are not limited to the Puerto Rican refiners and their employees. The Government of Puerto Rico is under an obligation by encouraging manufactures, to afford opportunities for employment to masses of its citizens. The capacity of its agricultural resources to care for its population has been rather fully exploited. Its only chance at salvation lies in the fabrication of goods for mainland markets. The threat of the new Colonial system hangs over it more heavily than the pressures of the Old Colonial System upon the people of the North American Colonies. For in 1776, the frontier beckoned, and a wide open continent was there to relieve the pressures of British policy. Its population density allows to the people of Puerto Rico no escape save through the development of processing industries. To find the power of the Congress in question to be lawful is to deliver the liberties of the people, their industrial opportunities and the economy of Puerto Rico into the political control of the Congress.

The threat of imposing a Colonial status upon Puerto Rico is the more ominous because it is without political weapons with which to defend itself. It has no access to the political process for the redress of its grievances. Although its citizens are citizens of the United States, only local suffrage has been extended to Puerto Rico. Its people elect their Governor, their officials, the members of the two houses of their legislature. But the acts of its legislature are subject to presidential veto and to the revision or the annulment of the Congress. The Island is represented in the Congress by a single Resident Commissioner,

who sits in the House of Representatives, participates in discussions, but has no vote. Accordingly, the issue presented by the accused section is not a political question; and *Massachusetts* v. *Mellon*, 262 U. S. 447 43 S. Ct. 597, can here have no application. Against the doom of consignment to a colonial status, the people of Puerto Rico have no defense except to ask judicial protection of the rights and liberties guaranteed to them by the Constitution. If this Court fails them, there is no other way to salvation.[133]

The question presented here is simple and clean-cut. Has the Congress the power to convert Puerto Rico into a plantation, to limit its industry to the production of raw materials, to exclude it from all processing and manufacture for mainland consumption? Has the Congress the power to abridge the rights and liberties of citizens of the United States living and doing business in Puerto Rico in order that it may confer special privileges upon a favored group of citizens of the United States who live and do business on the mainland? Has the Congress the power to impose upon Puerto Rico, its economy, and its citizens, the iron fetters of the Old Colonial System? As Mr. Chief Justice White was in the habit of putting it, "to ask the question is to answer it."

VII. CONCLUSION.

Section 207(b) of the Act should be declared null and void as abridging the liberties of persons without due process of law, as running contrary to the intent and spirit of the Constitution, and as seeking to impose upon a group

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[133] In *U. S.* v. *Cooper Corporation*, 312 U. S. 600, 61 S. Ct. 742, the Supreme Court refused to allow the United States as a person to sue for triple damages under Section 7 of the Sherman Act; in *State of Georgia* v. *Evans*, 316 U. S. 159, 62 S. Ct. 972, a like suit was allowed to a state of the Union. The court's rationale was that other forms of action were available to the United States, and no other remedy was available to the State of Georgia.

of citizens of the United States a permanent colonial status.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

April Term, 1948

No. 9769

CENTRAL ROIG REFINING COMPANY and
WESTERN SUGAR REFINING COMPANY,
Appellants,

vs.

SECRETARY OF AGRICULTURE,
Appellee;

PORTO RICAN AMERICAN SUGAR REFINERY, INC., and
THE AMERICAN SUGAR REFINING COMPANY, et al.,
Intervenors.

Before: Clark, Prettyman and Proctor, JJ.

ORDER

On consideration of the motion of the Government of Puerto Rico for leave to intervene in the above entitled case and of the answer thereto filed by Intervenors The American Sugar Refining Company, et al., and of appellants' reply to said answer, and of the reply of the Government of Puerto Rico to said answer, It is

ORDERED by the Court that the Government of Puerto Rico be, and it is hereby allowed to intervene in the above entitled case.

PER CURIAM.

Dated June 9, 1948.

APPENDIX "B"

Puerto Rico's Right to Maintain This Action

It has been shown in the text above that the Government of Puerto Rico has a vital interest in this case; that this interest cannot adequately be represented by any other party to the proceeding; that it will, whether a party or not, be bound by the decision presently to be reached; that the Department of Justice here represents an adverse party; and that the destiny of its people and the insular economy turns upon the fate of its prayer for relief. There seem to be no cases directly in point. It remains, therefore, to survey the case-law, relevant and not so relevant, to make it clear that there is no legal authority which may be invoked to deny to the Government of Puerto Rico status in the instant case.

1. *The Government of Puerto Rico will be bound by, and hence as parens patriae is entitled to maintain this action, to protect its people against the economic pattern which the accused section threatens to impose.*

The substantial interest of the Government of Puerto Rico and of its people in the instant case has been set forth in detail above. The power to enact the accused section is the power to impose a colonial status upon the island for the benefit of the manufacturing interest on the continent: Surely an interest so vital is not, with no recourse to the courts, at the mercy of the Congress.

The case of *Massachusetts* v. *Mellon*, 262 U. S. 447, 43 S. Ct. 597, gives no support to a denial to the Government of Puerto Rico as *parens patriae* the right to maintain this action. In that case Massachusetts was challenging an act of the Congress conferring grants, among other things for maternity care, upon the several states of the union—provided the contributions were matched—as lying beyond the spending power of the Congress. The court held that Massachusetts might at its pleasure, accept or reject the contribution; was in nowise injured or damaged; and had no basis upon which to sustain a cause of action.

In the instant case no issue has been raised about the spending power of Congress. There is not even a potential issue over the spending power of the Congress; for if, under the Act, any bounties are paid, they are not paid to the Government of Puerto Rico. But, even if we distort *Massachusetts* v. *Mellon* by making its doctrine applicable to the benefits which the people of a state or territory receive because of the pattern of order imposed upon the raw sugar industry, still its holding is not in point. For the Government of Puerto Rico has at length contended above that Section 207(h) is not an essential and necessary part of the Act, but a piece of special

legislation, imposing a gross discrimination upon the citizens of the island for the benefit of the sugar refiners on the mainland.

To hold that the Act must be treated as an entity is to foreclose the questions which it is the very purpose of this case to answer. The suit of the State of Massachusetts was dismissed as involving a political question. In respect to federal legislation Massachusetts and its people had full and unimpaired access to the political process. A "political question" is in the instant case without meaning; Puerto Rico and its people, in respect to federal legislation, have no access to a political process. In this connection may we ask the Court to list for itself all the hypotheses which must be accepted to make *Massachussets* v. *Mellon* the governing authority in respect to the motion of the Government of Puerto Rico for leave to intervene.

The governing case on *parens patriae* is the *State of Georgia* v. *Pennsylvania Railroad*, 324 U. S. 439, 65 Sup. Ct. 716, reh. den. 324 U. S. 890, 65 S. Ct. 1018. In that case the State of Georgia in behalf of itself and its people, was permitted a cause of action *parens patriae* to protect its state economy against the impact of a system of freight rates imposed by an unlawful combination of carriers. The suit there was against a group of corporations; here it is against the Secretary. Such a difference is of academic interest only; for, if it be argued that the State of Georgia case does not go so far as to authorize a suit against the Secretary, the answer is that in fact the Government of Puerto Rico has instituted no such suit. It intervened in the Court below, in an action already brought, to safeguard its own interests and those of its people. The evils complained of, and the questions raised, in this action and in the *State of Georgia* case are almost identical; and the right of an agency of state to sue in behalf of its people is put beyond doubt. Such a right of suit *parens patriae* rests upon old and established law as attested by the citations in *Georgia* v. *Pennsylvania R.R.* See also *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 27 S. Ct. 618. Nor is there merit in the contention that in respect to economic discrimination the source of which lies outside the territory, the proper agency to assume the role of *parens patriae* is the federal, not the local government. That argument was strongly pressed in *Georgia* v. *Pennsylvania R.R.*, and was there adjudged to be wanting in merit.

2. *Puerto Rico is an organized territory of the United States; and an analogue of the insular to a municipal government cannot deny to it the right to maintain this action.*

Here the argument which would deny to Puerto Rico the right to maintain this action rests upon the proposition that the creature cannot go to law against the creator; that the Government of Puerto Rico, having been established by Act of Congress, cannot bring—and presumably cannot become a party to—a suit against the United

States. In technical terms it can be answered that the suit is not against the United States, but against the Secretary to prevent him from enforcing a provision of a federal statute challenged as invalid. On that level the argument all but answers itself. For in *Franklin Township* v. *Tugwell*, 85 F. (2d) 208, 211, it is held that an agency of government, even of the minor rank of a municipality, could challenge as unconstitutional a federal statute through maintaining a suit against officials of the United States. On the substantive level, it is admitted that now and then, such a line about creature and creator is to be found in the federal reports. But it is invariably recited as a dictum, usually in an opinion as remote from the instant case as is *Coleman* v. *Miller*, 307 U. S. 433, 59 S. Ct. 972. Such an argument often put forward has never been accorded recognition. If it were valid, the original thirteen states which united to form the Union would have rights superior to those of the other thirty-five states which are creatures of the United States.

The analogy, by which the United States becomes a state and Puerto Rico a municipality within it is too forced and too far-fetched to deserve serious consideration. That Puerto Rico has not been admitted to the Union goes without saying; that its status is that of a municipality has no support in fact and little in judicial opinion. The exact position of Puerto Rico in the political system known as the United States of America involves an inquiry, much too complex and with far too many facets to be explored short of a comprehensive study. In respect to its status, two outstanding considerations have been recited in the text above. The one is that, in fact, the Government of Puerto Rico exercises powers in general superior to those of a state government. This is necessarily so; for its distance from the continent, its different cultural tradition, its larger concentration of political authority and the density of its population call for the performance by the insular government of many functions which for the several states are performed by the federal government. In this connection note, for example, insular control over public lands, taxation and shaping the pattern of the domestic economy. The other is that the status of Puerto Rico has never been at rest. The Organic Act decreed by Congress takes the place of a State Constitution. This Organic Act has been many times amended always towards elevating the status of Puerto Rico. If the right to maintain this action turns upon whether Puerto Rico is more a state or a municipality, the question can have but one answer. The Government of Puerto Rico, among its other obligations, must secure to its people the liberties to which they are entitled as citizens of the United States.

The cases which might be invoked to support the contention that the Government of Puerto Rico cannot maintain this action in its governmental capacity are none too relevant. The great bulk of them have to do with the power of a municipality to sue a state. As such they break on the stubborn fact that Puerto Rico is not a mu-

nicipality. They are likewise irrelevant in that the situations they present and the questions they raise are far removed from anything before the Court in the instant case. Nor do they in general support the propositions for which they might be cited. For example, in *City of New York* v. *N. Y. Tel. Co.*, 261 U. S. 312, 43 S. Ct. 372 and *City of New York* v. *Consolidated Gas Co.*, 253 U. S. 219, 40 S. Ct. 511, the United States Supreme Court refused intervention to the City of New York on the ground that the duty of protecting the very interest which the City of New York wished to represent had been delegated by the State legislature to the New York Public Service Commission. In like manner in *Gross* v. *Missouri and A. Ry. Co.*, 74 F. Supp. 242, when the City of Eureka Springs, Arkansas, sought to intervene, the Court pointed out that the State of Arkansas had already taken that function upon itself. In *Pennsylvania* v. *Williams*, 294 U. S. 176, 55 S. Ct. 380, intervention was allowed to the agency of state which possessed the superior obligation to protect the interest for which intervention was sought. There is, of course, variance in the cases as to whether, in case of conflict, the State or the municipality has the superior obligation in respect to the interest at stake, and therefore is to be preferred as a suitor. But no case has been discovered in which a governmental agency, within whose dominion the protection of the interest lies, has been adjudged not to have the right to maintain an action. In fact the usual reason for the denial of the right to action is that the task of protection has been formerly entrusted to some other agency of State. In respect to the matter in question here there is no competitive agency of State seeking to represent the interests of the Government and the People of Puerto Rico.

The interests of the Government of Puerto Rico and its people cannot adequately be represented by any other party in interest in the three cases. Here see *Wolpe* v. *Poretsky*, 144 F. (2d) 505, cert. den. 323 U. S. 777, 65 S. Ct. 190; *Central Trust Co. of New York* v. *Chicago R.I. and P.R. Co.*, 218 Fed. 336; *United States* v. *C. M. Lane Lifeboat Co.*, 25 F. Supp. 410. On the legitimate limits of intervention see *U. S.* v. *Terminal Railroad Assn. of St. Louis, et al.*, 236 U. S. 194, 35 S. Ct. 408; *Evens and Howard Fire Brick Company and Union Sand and Material Company* v. *U. S.*, 236 U. S. 210, 35 S. Ct. 415.

In a word, if the Government of Puerto Rico has no right to maintain this action, the interests which it seeks to protect are left entirely without representation.

APPENDIX "C"

Relevant Sections of the Sugar Act of 1948. (U.S.C., title 7, §§ 1100-1160).

AN ACT

To regulate commerce among the several States, with the Territories and possessions of the United States, and with foreign countries; to protect the welfare of consumers of sugars and of those engaged in the domestic sugar-producing industry; to promote the export trade of the United States; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Sugar Act of 1948".

TITLE I—DEFINITIONS

SEC. 101. For the purposes of this Act, except title V—

(a) The term "person" means an individual, partnership, corporation, or association.

(b) The term "sugars" means any grade or type of saccharine product derived from sugarcane or sugar beets, which contains sucrose, dextrose, or levulose.

(c) The term "sugar" means raw sugar or direct-consumption sugar.

(d) The term "raw sugar" means any sugars which are principally of crystalline structure and which are to be further refined or improved in quality, and any sugars which are principally not of crystalline structure, but which are to be further refined or otherwise improved in quality to produce any sugars principally of crystalline structure.

e) The term "direct-consumption sugar" means any sugars which are principally of crystalline structure and which are not to be further refined or otherwise improved in quality.

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(h) The "raw value" of any quantity of sugars means its equivalent in terms of ordinary commercial raw sugar testing ninety-six sugar degrees by the polariscope, determined in accordance with regulations to be issued by the Secretary. The principal grades and types of sugar and liquid sugar shall be translated into terms of raw value in the following manner:

(1) For direct-consumption sugar, derived from sugar beets and testing ninety-two or more sugar degrees by the poraliscope, by multiplying the number of pounds thereof by 1.07;

(2) For sugar, derived from sugarcane and testing ninety-two

sugar degrees by the polariscope, by multiplying the number of pounds thereof by 0.93;

(3) For sugar, derived from sugarcane and testing more than ninety-two sugar degrees by the polariscope, by multiplying the number of pounds thereof by the figure obtained by adding to 0.93 the result of multiplying 0.0175 by the number of degrees and fractions of a degree of polarization above ninety-two degrees;

(4) For sugar and liquid sugar, testing less than ninety-two sugar degrees by the polariscope, by dividing the number of pounds of the "total sugar content" thereof by 0.972.

(5) The Secretary may establish rates for translating sugar and liquid sugar into terms of raw value for (a) any grade or type of sugar or liquid sugar not provided for in the foregoing and (b) any special grade or type of sugar or liquid sugar for which he determines that the raw value cannot be measured adequately under the provisions of paragraph (1) to (4), inclusive, of this subsection (h).

(i) The term "total sugar content" means the sum of the sucrose (Clerget) and reducing or invert sugars contained in any grade or type of sugar or liquid sugar.

(j) the term "quota", depending upon the context, means (1) that quantity of sugar or liquid sugar which may be brought or imported into the continental United States, for consumption therein, during any calendar year, from the Territory of Hawaii, Puerto Rico, the Virgin Islands, or a foreign country or group of foreign countries; (2) that quantity of sugar or liquid sugar produced from sugar beets or sugarcane grown in the continental United States which, during any calendar year, may be shipped, transported, or marketed in interstate commerce, or in competition with sugar or liquid sugar shipped, transported, or marketed in interstate or foreign commerce; or (3) that quantity of sugar or liquid sugar which may be marketed in the Territory of Hawaii or in Puerto Rico, for consumption therein, during any calendar year.

(k) The term "producer" means a person who is the legal owner, at the time of harvest or abandonment, of a portion or all of a crop of sugar beets or sugarcane grown on a farm for the extraction of sugar or liquid sugar.

(l) The terms "including" and "include" shall not be deemed to exclude anything not mentioned but otherwise within the meaning of the term defined.

(m) The term "Secretary" means the Secretary of Agriculture.

TITLE II—QUOTA PROVISIONS

SEC. 201. The Secretary shall determine for each calendar year, beginning with the calendar year 1948, the amount of sugar needed to meet the requirements of consumers in the continental United States; such determinations shall be made during the month of December in each year for the succeeding calendar year (in the

case of the calendar year 1948, during the first ten days thereof) and at such other times during such calendar year as the Secretary may deem necessary to meet such requirements. In making such determinations the Secretary shall use as a basis the quantity of direct-consumption sugar distributed for consumption, as indicated by official statistics of the Department of Agriculture, during the twelve-month period ending October 31 next preceding the calendar year for which the determination is being made, and shall make allowances for a deficiency or surplus in inventories of sugar, and for changes in consumption because of changes in population and demand conditions, as computed from statistics published by agencies of the Federal Government; and, in order that such determinations shall be made so as to protect the welfare of consumers and of those engaged in the domestic sugar industry by providing such supply of sugar as will be consumed at prices which will not be excessive to consumers and which will fairly and equitably maintain and protect the welfare of the domestic sugar industry, the Secretary, in making any such determination, in addition to the consumption, inventory, population, and demand factors above specified and the level and trend of consumer purchasing power, shall take into consideration the relationship between the prices at wholesale for refined sugar that would result from such determination and the general cost of living in the United States as compared with the relationship between prices at wholesale for refined sugar and the general cost of living in the United States obtaining during 1947 prior to the termination of price control of sugar as indicated by the Consumers' Price Index as published by the Bureau of Labor Statistics of the Department of Labor.

SEC. 202. Whenever a determination is made, pursuant to section 201, of the amount of sugar needed to meet the requirements of consumers, the Secretary shall establish quotas, or revise existing quotas—

(a) For domestic sugar-producing areas, by apportioning among such areas 4,268,000 short tons, raw value, as follows:

Area	Short tons, raw value
Domestic beet sugar	1,800,000
Mainland cane sugar	500,000
Hawaii	1,052,000
Puerto Rico	910,000
Virgin Islands	6,000

(b) For the Republic of the Philippines, in the amount of nine hundred and fifty-two thousand short tons of sugar as specified in section 211 of the Philippine Trade Act of 1946.

(c) For foreign countries other than the Republic of the Philippines, by prorating among such areas an amount of sugar, raw value, equal to the amount determined pursuant to section 201 less

the sum of the quotas established pursuant to subsections (a) and (b) of this section, on the following basis:

Area	Per centum
Cuba	98.64
Foreign countries other than Cuba and the Republic of the Philippines	1.36

The quota for foreign countries other than Cuba and the Republic of the Philippines shall be prorated among such countries on the basis of the division of the quota for such countries made in General Sugar Quota Regulations, Series 4, Number 1, issued December 12, 1936, pursuant to the Agricultural Adjustment Act, as amended.

(d) Notwithstanding the other provisions of this title II, in the event the quota established for Cuba, including any and all deficits allotted or prorated to Cuba pursuant to the provisions of section 204 (a), shall be a smaller proportion of the total amount of sugar which the Secretary determines is needed to meet the requirements of consumers in the continental United States pursuant to section 201 of this Act, than the quota which would have been established for Cuba upon such consumptive estimate under the provisions of section 202 (b) of the Sugar Act of 1937, the quotas for domestic sugar-producing areas established pursuant to the other provisions of this title II shall be reduced pro rata by such amounts as are required to establish such quota for Cuba and the amounts by which such domestic sugar-producing quotas are so reduced shall be added to the quota for Cuba.

(e) If the Secretary of State finds that any foreign country denies fair and equitable treatment to the nationals of the United States, its commerce, navigation, or industry, and so notifies the Secretary, the Secretary shall have authority to withhold or withdraw any increase in the share of the domestic consumption requirements provided for such country by this Act as compared with the share allowed under section 202 (b) of the Sugar Act of 1937: *Provided*, That any amount of sugar so withheld or withdrawn shall be prorated to domestic areas on the basis of existing quotas for such areas and the Secretary shall revise such quotas accordingly: *Provided further*, That any portion of such amount of sugar which cannot be supplied by domestic areas may be prorated to foreign countries other than a country which the Secretary of State finds has denied fair and equitable treatment to nationals of the United States.

SEC. 203. In accordance with such provisions of section 201 as he deems applicable, the Secretary shall also determine the amount of sugar needed to meet the requirements of consumers in the Territory of Hawaii, and in Puerto Rico, and shall establish quotas for the amounts of sugar which may be marketed for local consumption in such areas equal to the amounts determined to be needed to meet the requirements of consumers therein.

SEC. 204. (a) The Secretary shall, from time to time during the calendar year, determine whether, in view of the current inventories of sugar, the estimated production from the acreage of sugarcane or sugar beets planted, the normal marketings within a calendar year of new-crop sugar, and other pertinent factors, any domestic area, the Republic of the Philippines, or Cuba, will be unable to market the quota for such area. If the Secretary finds that any domestic area or Cuba will be unable to market the quota for such area for the calendar year then current, he shall revise the quotas for the domestic areas and Cuba by prorating an amount of sugar equal to the deficit so determined to the other such areas on the basis of the quotas then in effect: *Provided, however*, That domestic areas shall not share in any deficit of any domestic area if the then outstanding determination of the Secretary made pursuant to section 201 of the Act is less than seven million short tons, raw value. If the Secretary finds that the Republic of the Philippines will be unable to market the quota for such area for the calendar year then current, he shall revise the quotas for Cuba and foreign countries other than Cuba and the Republic of the Philippines by prorating an amount of sugar equal to the deficit so determined, as follows:

To Cuba	95 per centum
To foreign countries other than Cuba and the Republic of the Philippines	5 per centum

Provided, however, That whenever the quota for Cuba established under the provisions of this Act other than section 202 (d) is less than the amount required by the provisions of section 202 (d) of this Act, such prorations shall be as follows:

To Cuba	98.64 per centum
To foreign countries other than Cuba and the Republic of the Philippines	1.36 per centum

Any portion of such Philippine deficit which the Secretary determines cannot be supplied by Cuba shall be prorated to foreign countries other than Cuba and the Republic of the Philippines. No part of any Philippine deficit so prorated may be filled by direct-consumption sugar.

(b) If, on the 1st day of September in any calendar year, any part or all of the proration to any foreign country of the quota for foreign countries other than Cuba and the Republic of the Philippines established under the provisions of section 202 (c) has not been filled, the Secretary may revise the proration of such quota among such foreign countries by allotting an amount of sugar equal to such unfilled proration to such foreign countries as have filled their prorations of such quota by such date.

(c) The quota for any domestic area, the Republic of the Philippines, Cuba, or other foreign countries as established under the

provisions of section 202 shall not be reduced by reason of any determination of a deficit existing in any calendar year under the provisions of subsections (a) and (b) of this section 204.

(d) Any proration among foreign countries other than Cuba and the Republic of the Philippines pursuant to this section shall be on such basis as the Secretary shall determine.

SEC. 205. (a) Whenever the Secretary finds that the allotment of any quota, or proration thereof, established for any area pursuant to the provisions of this Act, is necessary to assure an orderly and adequate flow of sugar or liquid sugar in the channels of interstate or foreign commerce, or to prevent disorderly marketing or importation of sugar or liquid sugar, or to maintain a continuous and stable supply of sugar or liquid sugar, or to afford all interested persons an equitable opportunity to market sugar or liquid sugar within any area's quota, after such hearing and upon such notice as he may by regulations prescribe, he shall make allotments of such quota or proration thereof by allotting to persons who market or import sugar or liquid sugar, for such periods as he may designate, the quantities of sugar or liquid sugar which each such person may market in continental United States, the Territory of Hawaii, or Puerto Rico, or may import or bring into continental United States for consumption therein. Allotments shall be made in such manner and in such amounts as to provide a fair, efficient, and equitable distribution of such quota or proration thereof, by taking into consideration the processings of sugar or liquid sugar from sugar beets or sugarcane to which proportionate shares, determined pursuant to the provisions of subsection (b) of section 302, pertained; the past marketings or importations of each such person; and the ability of such person to market or import that portion of such quota or proration thereof allotted to him. The Secretary may also, upon such hearing and notice as he may by regulations prescribe, revise or amend any such allotment upon the same basis as the initial allotment was made.

(b) An appeal may be taken, in the manner hereinafter provided, from any decision making such allotments, or revisions thereof, to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for an allotment whose application shall have been denied.

(2) By any person aggrieved by reason of any decision of the Secretary granting or revising any allotment made to him.

(c) Such appeal shall be taken by filing with said court, within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Secretary. Unless a later date is specified by the Secretary as part of his decision, the decision complained of shall be considered to be effective as of the date on which public

announcement of the decision is made at the office of the Secretary in the city of Washington. The Secretary shall thereupon, and in any event not later than ten days from the date of such service upon him, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Secretary to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person to inspect and make copies of appellants' reasons for said appeal at the office of the Secretary in the city of Washington. Within thirty days after the filing of said appeal the Secretary shall file with the court the originals or certified copies of all papers and evidence presented to him upon the hearing involved, a like copy of his decision thereon, a full statement in writing of the facts and grounds for his decisions as found and given by him and a list of all interested persons to whom he has mailed or otherwise delivered a copy of said notice of appeal.

(d) Within thirty days after the filing of said appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party together with proof of service of true copies of said notice and statement, both upon the appellant and upon the Secretary. Any person who would be aggrieved or whose interests would be adversely affected by reversal or modification of the decision of the Secretary complained of shall be considered an interested party.

(e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision, and if it enters an order reversing the decision of the Secretary it shall remand the case to the Secretary to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Secretary are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States, upon writ of certiorari on petition therefor, under section 240 of the Judicial Code, as amended (U. S. C., title 28, sec. 347), by appellant, by the Secretary, or by any interested party intervening in the appeal.

(f) The court may, in its discretion, enter judgment for costs in favor of or against an appellant, and other interested parties intervening in said appeal, but not against the Secretary, depending upon the nature of the issues involved in such appeal and the outcome thereof.

SEC. 206. Subject to the provisions of sections 207 and 408 relating to the suspension of quotas, sugar quotas shall be established

pursuant to this Act for the calendar year 1948 within ten days after effective date of this Act.

SEC. 207. (a) Not more than twenty-nine thousand six hundred and sixteen short tons, raw value, of the quota for Hawaii for any calendar year may be filled by direct-consumption sugar.

(b) Not more than one hundred and twenty-six thousand and thirty-three short tons, raw value, of the quota for Puerto Rico for any calendar year may be filled by direct-consumption sugar.

(c) None of the quota for the Virgin Islands for any calendar year may be filled by direct-consumption sugar.

(d) Not more than fifty-six thousand short tons of sugar of the quota for the Republic of the Philippines for any calendar year may be filled by direct-consumption sugar as specified in section 211 of the Philippine Trade Act of 1946.

(e) Not more than three hundred and seventy-five thousand short tons, raw value, of the quota for Cuba for any calendar year may be filled by direct-consumption sugar.

(f) This section shall not apply with respect to the quotas established under section 203 for marketing for local consumption in Hawaii and Puerto Rico.

(g) The direct-consumption portions of the quotas established pursuant to this section, and the enforcement provisions of title II applicable thereto, shall continue in effect and shall not be subject to suspension pursuant to the provisions of section 408 of this Act unless the President acting thereunder specifically finds and proclaims that a national economic or other emergency exists with respect to sugar or liquid sugar which requires the suspension of direct-consumption portions of the quotas.

* * * * * * * * * *

SEC. 209. All persons are hereby prohibited—

(a) From bringing or importing into the continental United States from the Territory of Hawaii, Puerto Rico, the Virgin Islands, or foreign countries, (1) any sugar or liquid sugar after the applicable quota, or the proration of any such quota, has been filled, or (2) any direct-consumption sugar after the direct-consumption portion of any such quota has been filled;

(b) From shipping, transporting, or marketing in interstate commerce, or in competition with sugar or liquid sugar shipped, transported, or marketed in interstate or foreign commerce, any sugar or liquid sugar produced from sugar beets or sugarcane grown in either the domestic-beet-sugar area or the mainland cane-sugar area after the quota for such area has been filled;

(c) From marketing in either the Territory of Hawaii or Puerto Rico, for consumption therein, any sugar or liquid sugar after the quota therefor has been filled;

(d) From exceeding allotments of any quota, direct-consumption portion of any quota, or proration of any quota, made to them pursuant to the provisions of this Act.

SEC. 210. (a) The determinations provided for in sections 201 and 203, and all quotas, prorations, and allotments, except quotas established pursuant to the provisions of section 208, shall be made or established in terms of raw value.

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SEC. 211. • • • • •

(c) The quota established for any domestic sugar-producing area may be filled only with sugar or liquid sugar produced from sugar beets or sugarcane grown in such area: *Provided, however,* That any sugar or liquid sugar admitted free of duty from the Virgin Islands under the Act of Congress, approved March 3, 1917 (39 Stat. 1133), may be admitted within the quota for the Virgin Islands.

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TITLE III—CONDITIONAL-PAYMENT PROVISIONS

SEC. 301. The Secretary is authorized to make payments on the following conditions with respect to sugar or liquid sugar commercially recoverable from the sugar beets or sugarcane grown on a farm for the extraction of sugar or liquid sugar:

• • • • • • • • • • •

(b) That there shall not have been marketed (or processed) an amount (in terms of planted acreage, weight, or recoverable sugar content) of sugar beets or sugarcane grown on the farm and used for the production of sugar or liquid sugar to be marketed in, or so as to compete with or otherwise directly affect interstate or foreign commerce, in excess of the proportionate share for the farm, as determined by the Secretary, pursuant to the provisions of section 302, of the total quantity of sugar beets or sugarcane required to be processed to enable the area in which such sugar beets or sugarcane are produced to meet the quota (and provide a normal carry-over inventory) as estimated by the Secretary for such area for the calendar year during which the larger part of the sugar or liquid sugar from such crop normally would be marketed.

(c) (1) That all persons employed on the farm in the production, cultivation, or harvesting of sugar beets or sugarcane with respect to which an application for payment is made shall have been paid in full for all such work, and shall have been paid wages therefor at rates not less than those that may be determined by the Secretary to be fair and reasonable after investigation and due notice and opportunity for public hearing; and in making such determinations the Secretary shall take into consideration the standards therefor formerly established by him under the Agricultural Adjustment Act, as amended, and the differences in conditions among various producing areas: *Provided, however,* That a payment which would be payable except for the foregoing provisions of this sub-

paragraph may be made, as the Secretary may determine, in such manner that the laborer will receive an amount, insofar as such payment will suffice, equal to the amount of the accrued unpaid wages for such work, and that the producer will receive the remainder, if any, of such payment.

(2) That the producer on the farm who is also, directly or indirectly a processor of sugar beets or sugarcane, as may be determined by the Secretary shall have paid, or contracted to pay under either purchase or toll agreements, for any sugar beets or sugarcane grown by other producers and processed by him at rates not less than those that may be determined by the Secretary to be fair and reasonable after investigation and due notice and opportunity for public hearing.

SEC. 302. (a) The amount of sugar or liquid sugar with respect to which payment may be made shall be the amount of sugar or liquid sugar commercially recoverable, as determined by the Secretary, from the sugar beets or sugarcane grown on the farm and marketed (or processed by the producer) not in excess of the proportionate share for the farm, as determined by the Secretary, of the quantity of sugar beets or sugarcane for the extraction of sugar or liquid sugar required to be processed to enable the producing area in which the crop of sugar beets or sugarcane is grown to meet the quota (and provide a normal carry-over inventory) estimated by the Secretary for such area for the calendar year during which the larger part of the sugar or liquid sugar from such crop normally would be marketed.

(b) In determining the proportionate shares with respect to a farm, the Secretary may take into consideration the past production on the farm of sugar beets and sugarcane marketed (or processed) for the extraction of sugar or liquid sugar and the ability to produce such sugar beets or sugarcane, and the Secretary shall, insofar as practicable, protect the interests of new producers and small producers and the interests of producers who are cash tenants, share tenants, adherent planters, or share croppers.

(c) Payments shall be effective with respect to sugar or liquid sugar commercially recoverable from sugar beets and sugarcane grown on a farm commencing with the crop year 1948.

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SEC. 307. This title shall apply to the continental United States, the Territory of Hawaii, Puerto Rico, and the Virgin Islands.

TITLE IV—GENERAL PROVISIONS

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SEC. 404. The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating, the provisions of this Act or of any order or regulation made or issued pursuant to this

Act. If and when the Secretary shall so request, it shall be the duty of the several district attorneys of the United States, in their respective districts, to institute proceedings to enforce the remedies and to collect the penalties and forfeitures provided for in this Act. The remedies provided for in this Act shall be in addition to, and not exclusive of, any of the remedies or penalties existing at law or in equity.

SEC. 405. Any person who knowingly violates, or attempts to violate, or who knowingly participates or aids in the violation of, any of the provisions of section 209, or any person who brings or imports into the continental United States direct-consumption sugar after the quantities specified in section 207 have been filled, shall forfeit to the United States the sum equal to three times the market value, at the time of the commission of any such act, (a) of that quantity of sugar or liquid sugar by which any quota, proration, or allotment is exceeded, or (b) of that quantity brought or imported into the continental United States after the quantities specified in section 207 have been filled, which forfeiture shall be recoverable in a civil suit brought in the name of the United States.

• • • • • • • • • • •

SEC. 408. Whenever pursuant to the provisions of this Act the President finds and proclaims that a national economic or other emergency exists with respect to sugar or liquid sugar, he shall by proclamation suspend the operation, except as provided in section 207 of this Act, of all the provisions of title II above, and, thereafter, the operation of such title shall continue in suspense until the President finds and proclaims that the facts which occasioned such suspension no longer exist. The Secretary shall make such investigations and reports thereon to the President as may be necessary to aid him in carrying out the provisions of this section.

• • • • • • • • • • •

SEC. 411. The powers vested in the Secretary under this Act shall terminate on December 31, 1952, except that the Secretary shall have power to make payments under title III under programs applicable to the crop year 1952 and previous crop years.

SEC. 412. The provisions of this Act, except where an earlier effective date is provided for herein, shall become effective January 1, 1948. As provided in section 513 of the Sugar Act of 1937, the powers vested in the Secretary under that Act shall terminate on December 31, 1947, except that the Secretary shall have power to make payments under title III of that Act under programs thereunder applicable to the crop year 1947 and previous crop years.

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APPENDIX "D"

Relevant Sections of Congressional Legislation Affecting Puerto Rico

Act of April 12, 1900—"First Organic Act of Puerto Rico"

Section 7—That all inhabitants continuing to reside therein who were Spanish subjects on the eleventh day of April, eighteen hundred and ninety-nine, and then resided in Puerto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Puerto Rico, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain on or before the eleventh day of April, ninteen hundred, in accordance with the provisions of the treaty of peace between the United States and Spain entered into on the eleventh day of April, eighteen hundred and ninety-nine; and they, together with such citizens of the United States as may reside in Puerto Rico, shall constitute a body politic under the name of The People of Puerto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such.

Act of March 2, 1917—"Organic Act of 1917, as amended"

BILL OF RIGHTS

Section 2—That no law shall be enacted in Puerto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws.

That in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense, to be informed of the nature and cause of the accusation, to have a copy thereof, to have a speedy and public trial, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor.

That no person shall be held to answer for a criminal offense without due process of law; and no person for the same offense shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself.

That all persons shall before conviction be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.

That no law impairing the obligation of contracts shall be enacted.

That no person shall be imprisoned for debt.

That the privilege of the writ of *habeas corpus* shall not be suspended, unless when in case of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the Governor, whenever during such period the necessity for such suspension shall exist.

That no *ex post facto* law or bill of attainder shall be enacted.

Private property shall not be taken or damaged for public use except upon payment of just compensation ascertained in the manner provided by law.

Nothing contained in this Act shall be construed to limit the power of the Legislature to enact laws for the protection of the lives, health, or safety of employees.

That no law granting a title of nobility shall be enacted, and no person holding any office or profit or trust under the Government of Puerto Rico shall, without the consent of the Congress of the United States, accept any present, emolument, office, or title of any kind whatever from any king, queen, prince, or foreign State, or any officer thereof.

That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

That the right to be secure against unreasonable searches and seizures shall not be violated.

That no warrant for arrest or search shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

That slavery shall not exist in Puerto Rico.

That involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall not exist in Puerto Rico.

That no law shall be passed abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances.

That no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed, and that no political or religious test other than an oath to support the Constitution of the United States and the laws of Puerto Rico shall be required as a qualification to any office or public trust under the Government of Puerto Rico.

* * *

(*As amended February 3, 1921*—41 Stat. 1096.)—That no public money or property shall ever be appropriated, applied, donated, used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution, or association, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary as such. Contracting of poligamous or plural marriages hereafter is prohibited.

That no money shall be paid out of the Treasury except in pur-

suance of an appropriation by law, and on warrant drawn by the proper officer in pursuance thereof.

That the rule of taxation in Puerto Rico shall be uniform.

That all money derived from any tax levied or assessed for a special purpose shall be treated as a special fund in the Treasury and paid out for such purpose only except upon the approval of the President of the United States.

That eight hours shall constitute a day's work in all cases of employment of laborers and mechanics by and on behalf of the Government of the Island on public works, except in cases of emergency.

That the employment of children under the age of fourteen years in any occupation injurious to health or moral or hazardous to life or limb is hereby prohibited.

• • •

Section 5—That all citizens of Puerto Rico, as defined by section seven of the Act of April twelfth, nineteen hundred, "temporarily to provide revenues and a civil government for Puerto Rico, and for other purposes", and all natives of Puerto Rico who were temporarily absent from that island on April eleventh, eighteen hundred and ninety-nine, and have since returned and are permanently residing in that island, and are not citizens of any foreign country, are hereby declared, and shall be deemed and held to be, citizens of the United States.

• • •

Section 5a—*"New Section inserted by Act of Congress approved March 4, 1927*—44 Stat. 1418).—That all citizens of the United States who have resided or who shall hereafter reside in the island for one year shall be citizens of Puerto Rico. . . .

• • •

Section 5b—(*New Section inserted by an Act of Congress approved June 27, 1934*).—All persons born in Puerto Rico on or after April 11, 1899 (whether before or after the effective date of this Act) and not citizens, subjects, or nationals of any foreign power, are hereby declared to be citizens of the United States; . . .

• • •

Section 5c—(*New Section inserted by an Act of Congress approved May 16, 1938*).—That any person of good character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, and born in Puerto Rico on or after April 11, 1899, who has continued to reside within the jurisdiction of the United States whose father elected on or before April 11, 1900, to preserve his allegiance to the Crown of Spain in accordance with the provisions of the treaty of peace between the United States and Spain entered into on April 11, 1899, and who, by reason of misinformation regarding his or her own citizenship status failed within the time limits prescribed by

Section 5 or Section 5a hereof to exercise the privilege of establishing United States citizenship and has heretofore erroneously but in good faith exercised the rights and privileges and performed the duties of a citizen of the United States, and has not personally sworn allegiance to any foreign government or ruler upon or after attainment of majority, may make a sworn declaration of allegiance to the United States before any United States district court. Such declaration shall set forth facts concerning his or her birth in Puerto Rico, good character, attachment to the principles of the Constitution of the United States, and being well disposed to the good order and happiness of the United States, residence within the jurisdiction of the United States, and misinformation regarding United States citizenship status, and shall be accompanied by proof thereof satisfactory to the court. After making such declaration and submitting such proofs, such person shall be admitted to take the oath of allegiance before the court, and thereupon shall be considered a citizen of the United States.

• • •

Section 9—That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Purto Rico as in the United States, except the internal revenue laws: . . .

Act of August 5, 1947, "Elective Governor Act":

Section 7. Section 2 of said Organic Act (48 U. S. C., sec. 737), is amended by adding at the end thereof the following new paragraph:

"The rights, privileges, and immunities of citizens of the United States shall be respected in Puerto Rico to the same extent as though Puerto Rico were a State of the Union and subject to the provisions of paragraph 1 of section 2 of article IV of the Constitution of the United States."

Act of April 12, 1900, c. 191, §3, 31 Stat. 77:

"All merchandise and articles coming into the United States from Puerto Rico and coming into Puerto Rico from the United States shall be entered at the several ports of entry free of duty and in no event shall any tariff duties be collected on said merchandise or articles."

Act of March 2, 1917, c. 145, §3, 39 Stat. 953; February 3, 1821, c. 34, §2, 41 Stat. 1096:

"No export duties shall be levied or collected on exports from Puerto Rico, but taxes and assessments on property, internal revenue, and license fees, and royalties for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments respectively, as may be provided and defined by the legislature of Puerto Rico; and when necessary to anticipate taxes and revenues, bonds, and other obligations may be issued by Puerto Rico or any municipal government therein as may be provided by law and to protect the public credit."

Act of April 12, 1900, c. 191, §9, 1 Stat. 79:

"The coasting trade between Puerto Rico and the United States shall be regulated in accordance with the provisions of law applicable to such trade between any two great coasting districts of the United States."

Constitution of the United States, Paragraph 1, Section 2, Article IV. This paragraph in the Constitution reads as follows:

"The citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several states."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 530

PORTO RICAN AMERICAN SUGAR REFINERY, INC., *Petitioner*,

v.

CENTRAL ROSE EXPORTING COMPANY and WESTERN SUGAR REFINING COMPANY, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

CHARLES J. ARMBRUSTER,
ARTHUR L. QUINN,
GORDON P. PEYTON,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

OPINION BELOW.

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 194) is not yet reported. The findings and order of the Secretary of Agriculture (Puerto Rico Sugar Order 18, R. 160-176) are reported in 13 F. R. 310-313.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This action arises under the Sugar Act of 1948 (61 Stat. 922-933, 7 U. S. C. 1100-1160). Section 201 of this Act provides that the Secretary of Agriculture shall determine for each calendar year the amount of sugar necessary to meet consumption requirements in the United States. Section

202 (a) specifies the quotas of sugar that may enter the United States from (1) the domestic beet sugar area; (2) the mainland cane sugar area; (3) Hawaii; (4) Puerto Rico; and (5) the Virgin Islands. Section 207 (b) provides that not more than 126,033 short tons of Puerto Rico's raw sugar quota for any year may be filled by direct-consumption sugar (*i.e.*, any sugar which is to be consumed without further processing) and Section 209 (a) prohibits the entry into the United States of any direct-consumption sugar after the direct-consumption portion of a quota has been filled. Section 205 (a) provides that whenever the Secretary of Agriculture deems it necessary, he may after notice and hearing, allot the quota for any area among the persons who market sugar from that area, arriving at a fair, efficient and equitable distribution by taking into consideration (1) the processings of sugar from sugar cane to which "proportionate shares" pertained; (2) "past marketings"; and (3) "ability . . . to market."

On December 4, 1947, the Secretary found it necessary to allot Puerto Rico's refined sugar quota for 1948, and accordingly published a notice of hearing. This hearing was held December 18-19, 1947. On January 16, 1948, the Secretary issued Order 18 (13 F. R. 310-313), which appears in full in the record (R. 160-176), allotting the Puerto Rican direct-consumption sugar quota among six allottees, including petitioner. In this order the Secretary found that the allotment was necessary to prevent disorderly marketing; he summarized the evidence introduced at the hearing; and he explained in detail why the method of allotment chosen resulted in "a fair, efficient and equitable distribution." In allotting the quota, the Secretary determined "ability to market" by considering the best single year's performance by each allottee during the period 1935-1947, inclusive. In determining "past marketings," the Secretary excluded the years 1942 through 1947 as unrepresentative, in view of wartime dislocations and governmental restrictions, and considered instead the average of the highest five years of

marketings by each refiner during the period 1935 through 1941. The Secretary considered also the standard of "proportionate shares," but found it inapplicable and therefore gave it a weighting of zero, since he concluded that "proportionate shares" can be calculated only with respect to the quantity of sugar cane processed into raw sugar (Section 302 (b) of the Act), and the three largest Puerto Rican refiners (which are the only insular refiners parties to the present action) do not engage in such processing.

Central Roig Refining Company and Western Sugar Refining Company, which were among the allottees, then appealed directly to the United States Court of Appeals for the District of Columbia Circuit under Section 205 of the Act, which permits such direct judicial review as to questions of law, and which also provides that the Secretary's findings of fact, if supported by substantial evidence, shall be final unless shown to be clearly arbitrary or capricious. Appellants in the lower court contended that Order 18 failed to comply with the requirements of Section 205 (a), and that Section 207 (b) violated the due process clause of the Fifth Amendment. The American Sugar Refining Company, *et al.*, intervened to defend the constitutionality of the Act. The Government of Puerto Rico intervened to attack its constitutionality. Petitioner intervened (R. 183-187) to defend the validity of Order 18. The Court of Appeals reversed Order 18 and remanded the case to the Secretary on the ground that he had no statutory authority to reject as inapplicable the standard of "proportionate shares," but was compelled to accord it some weight greater than zero: that "ability to market" must be measured by current marketings; and that "past marketings" must be measured by individual performances during the last six years or at least the more recent of them, regardless of whether war or any other external factor made those years unrepresentative. Because Order 18 was found to be invalid, the majority of the court decided that it was unnecessary to determine the constitutional question.

THE QUESTION INVOLVED.

Whether Order 18 of the Secretary of Agriculture complies with the standards of Section 205 (a) of the Sugar Act of 1948, and represents a permissible exercise of administrative discretion within the statutory framework of the Act.

JURISDICTIONAL STATEMENT.

It is contended that the Supreme Court has jurisdiction under 28 U. S. C. Section 1254, to review the judgment here in question, which was entered on November 24, 1948. This action was brought under Section 205 (b)-(f) of the Sugar Act of 1948. Section 205 (e) provides that the judgment of the United States Court of Appeals for the District of Columbia Circuit shall be subject to review by the Supreme Court upon writ of certiorari.

REASONS FOR GRANTING THE WRIT.

1. Inasmuch as the Court of Appeals has reversed an administrative order issued by the Secretary of Agriculture after due notice and hearing, and based upon extended findings supported by the hearing record, it has not given proper weight to decisions of this Court upholding the finality of reasonable administrative determinations. In recent years it has been stated by this Court so frequently that it has become almost axiomatic that an administrative decision will be upheld if it satisfies the requirements of due process, is based upon substantial evidence and is consistent with the authority granted by Congress, *e.g.*, *Gray* v. *Powell*, 314 U. S. 402, 412 (1941); *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, 146 (1939); *Swayne and Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304 (1937). This principle is, of course, applicable to determinations by the Secretary of Agriculture, see *St. Joseph Stock Yards Company* v. *United States*, 298 U. S. 38, 51 (1936). Order 18 was issued only after interested parties had been heard.

The evidence adduced at the hearing was relied upon and the three statutory standards were considered by the Secretary when he made his findings and determination. The allotment was found by the Secretary to be "fair, efficient and equitable" as required by the statute. Reversal by the Court of Appeals was predicated not upon the facts as stated in the record but upon the assumption that allotments under the Sugar Act of 1948 can be made only by adherence to the specific formula set forth by the Court of Appeals.

2. There are compelling reasons why the doctrine of administrative finality should be particularly applicable to allotment orders issued under the authority of the Sugar Act of 1948. Section 205 (a) provides that the allotments within any quota area shall be such as to result in a "fair, efficient and equitable distribution of such quota or proration thereof." This Court has held that the insertion in a statute of such words as "fair and equitable" evidences an intent by the framers to confer broad powers upon the agency entrusted with the administration of the statute, and precludes a reversal in the absence of a plain abuse of discretion, *Securities and Exchange Commission* v. *Chenery Corporation* et al., 332 U. S. 194, 208 (1947). Furthermore, this Court has recognized that broad discretion is required when allotments must be set pursuant to statute, *Railroad Commission of Texas* v. *Rowan & Nichols Oil Company*, 310 U. S. 573, 580-581 (1940). It has also recognized that where several factors enter into a determination, the administrator alone should decide the weight to be given each factor, *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 522 (1944). In the present case the Court of Appeals did not deny that the Secretary exercised his discretion with a view to achieving a fair and equitable result; indeed, the court expressly criticized the fact that in using pre-war as well as wartime marketings to measure "ability to market," the Secretary was motivated by a desire for fairness. The court held, in effect, that the Secretary has virtually no

discretion in administering the allotment provisions of the Sugar Act of 1948 regardless of the inequities which may result from the application of a hard and fast formula. Such an interpretation of the Sugar Act is wholly inconsistent with precedents of this Court.

3. This is the first case in which the Sugar Act of 1948 has been before the courts. In construing the Act to support the ruling that the Secretary acted beyond the scope of his statutory power, the United States Court of Appeals for the District of Columbia Circuit has decided a question of substance relating to the construction of a statute of the United States, which should be settled by this Court.

4. Petitioner is in accord also with the arguments advanced in the petition for certiorari which has been filed in the present case by the Secretary of Agriculture.

CONCLUSION.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia Circuit.

ORLANDO J. ANTONSANTI,
ARTHUR L. QUINN,
GORDON P. PEYTON,
Counsel for Petitioner.

February 21, 1949.

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM [redacted] 1949

No. [redacted] 32

THE GOVERNMENT OF PUERTO RICO, *Petitioner*

v.

THE SECRETARY OF AGRICULTURE, PORTO RICAN AMERICAN SUGAR REFINERY, INC., THE AMERICAN SUGAR REFINING COMPANY, ET AL., CENTRAL ROIG REFINING COMPANY and WESTERN SUGAR REFINING COMPANY, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the Government of Puerto Rico, a party to the proceeding below by its motion to intervene properly made and granted, respectfully prays for a writ of certiorari directed to the United States Court of Appeals to and for the District of Columbia Circuit to review the

decision and judgment of the said court in the case of *Central Roig Refining Company and Western Sugar Refining Company v. Secretary of Agriculture*, dated November 24, 1948. Petition has no interest in and no concern with the narrow statutory question upon which the Secretary of Agriculture this day is asking for a writ of certiorari. In accordance with its interests, the Government of Puerto Rico is seeking a review in respect to the constitutional question which, although "fully argued" as the opinion admits, the court below refused to decide. And, in support of this, its petition for certiorari, the Government of Puerto Rico says as follows:

I. Opinion Below.

The opinion of the United States Court of Appeals for the District of Columbia Circuit delivered on Nov. 24, 1948, has not yet appeared in reports.

II. Jurisdiction.

The jurisdiction of this Court is invoked under section 347, 28 U.S.C.A. (Judicial Code 240, as amended), in defense of rights established by the Constitution of the United States and extended to the people of Puerto Rico by the Act of Congress of March 2, 1917, as amended, known as the Organic Act. It is invoked against Section 207(a) of the Sugar Act of 1948, which is not authorized by the Constitution and which is repugnant to many of its provisions including among others Article I, sections 8 and 9, Article II, section 3, and the Fifth Amendment.

III. Statutes Involved.

In addition to the Constitution of the United States, the statutes principally involved in the instant case are the Organic Act of March 2, 1917, as amended, establishing the present civil government in Puerto Rico and sections 101, 201, 205 and 207 of the Sugar Act of 1948 (Pub. Law No. 388, 80th Cong., 1st Sess., ch. 519, Aug. 8, 1947).

IV. Statement of the Matter Involved.

The instant case presents two overlapping yet distinct questions. The first is the validity of the Decree and Order Allocating the Direct Consumption Portion of the 1948 Sugar Quota for Puerto Rico, issued by the Secretary of Agriculture. The second is the validity of the section of the Sugar Act of 1948 upon which the Order and Decree are predicated. Sugar Order No. 18 and Section 207(b), in legal challenge in the instant case, are technical in character and the justiciable issues which they present are to be understood only against the background of raw sugar, an industry in distress.

For many years the imposition of order and justice upon the raw sugar industry was left to the open market. The many sources of supply were widely scattered. The product extracted from cane and beets grown within the continental United States was insufficient to meet the demand. The great bulk of sugar essential to the nation's needs was purchased in the world market. In respect to raw sugar the market, giving play to competitive forces, failed in its regulatory office. Tropical growth and the one-crop system conspired to keep supply continuously in excess of a slowly increasing demand. Price was depressed below the cost of production. The growers were too numerous and too distant from each other either to adjust acreage to the ups and downs of price or through collective action to attack the sources of disorder. A competition out of hand resulted in a continuous plague of bankruptcy among the growers and for the workers a standard of life depressed far below the level of decency.

At last the Federal government was called upon to take over the regulatory office of the market. In the Jones-Costigan Act of 1934[1]—an adaptation of the current pattern of farm relief to the circumstances of sugar-growing—the intent of the Congress is clean. It is to lift the terri-

[1] May 9, 1934, C. 263, 48 Stat. 670, Title 7, Paragraphs 611.

tories from which the continental United States draws its sugar supply to a "plateau" and there to insulate raw sugar against the forces which had brought havoc to the world market. The rationale of this Act was to replace the open market with an administrative control in order that health might be brought to an industry in distress. The Jones-Costigan Act was superseded by the Sugar Act of 1937,[2] which in turn gave way to the Sugar Act of 1948.[3]

Thus in the Sugar Act of 1948 a pattern is imposed upon the growing of sugar. For technical reasons, in recognition that principal sources of supply are under foreign flags and because of an important decision of this court,[4] the Act was written in terms of the number of tons of sugar which annually each supplying territory was permitted to market on the mainland. To that end the Secretary of Agriculture[5] was instructed to determine for each year the total needs of the continental United States for household and industrial consumption (Act, Section 201). In accordance with what was right and fair, the total so ascertained was to be broken down and substantial quotas were to be assigned to Cuba, Hawaii, Puerto Rico, the Virgin Islands, the Republic of the Philippine Islands, as well as to the cane and the beet growing regions on the mainland. A small quota was assigned to the rest of the world.

In framing a statute addressed to the plight of raw sugar, the Congress kept the public interest to the front. A sufficient amount of sugar was permitted entrance to meet all domestic demands. No industry or person was to go without. For each of the sugar supplying territories—whether continental or off-shore—access to the mainland market was limited; and each, in lieu of competing for this market, had a quota assigned to it. The restriction has

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[2] Sept. 1, 1937, C. 898, 50 Stat. 903; Title 7, Paragraphs 1101-1183.

[3] Aug. 8, 1947, C. 519, Parag. 1, 61 Stat. 922; Title 7.

[4] In *U. S.* v. *Butler ex rel Hoosac Mills*, 297 U. S. 1, 56 S. Ct. 312.

[5] Hereinafter referred to as the Secretary.

not been severe; the quotas assigned to Hawaii and to Puerto Rico, as well as to the cane and the beet regions on the mainland, have not been far short of capacity. In the Act, Cuba, a foreign country—which alone can supply all our continental demands—is called upon to give flexibility to the system of control. In effect its variable quota makes up the deficit between our continental needs and the supplies available from American territories. Relief from a chaotic condition has been brought about by a marketing quota system which in effect serves the purpose of a protection tariff. As a result, the price of sugar has been stabilized at a level high enough to cover necessary costs; economic security has been established for the industry; the standard of life of the workers in the cane and beet fields has been substantially advanced. In general, as respects the growing of sugar, the Act has realized the intent which prompted it.

The task of Congress was finished in setting up the system of regulation for raw sugar. But the Congress went on to graft upon the Act certain alien provisions in respect to refined sugar. In spite of the fact that through the regulation of raw, supply has been equated to demand and that accordingly the business of refining could safely be left to the open market, it ventured where there was no legislative need. It did not, however, following its pattern for raw, and establish a system of allocation for refined sugar. It assigned no quotas to the several territories for the processing or marketing of refined. Instead, the Congress in specific terms decreed maxima for the "portions of the marketing quotas" assigned to the several off-shore territories which could be filled with "direct-consumption sugar". Thus, of the 910,000 short tons of sugar raw value which annually Puerto Rico was permitted to market in the continental United States, not more than 126,033 tons were to be imported in refined form. Similar restrictions were set against all the off-shore territories except the Virgin Islands which was permitted to market on the mainland no

sugar in refined form. Yet no similar maxima for the amounts they were permitted to market in refined form within the continental United States was set against any mainland refiners, any group of them, or against their number as a whole.

The character of this Act of discrimination appended to a farm relief act is obvious. Puerto Rico may market on the mainland refined sugar up to 126,033 tons, but not a pound in excess. It may market far less than the figure fixed or even none at all. To market any refined sugar, it must compete with the mainland refiners for the business. Yet the competition cannot be set in reverse; for the Act endows the Atlantic and Gulf coast refiners with the privilege of refining all sugar marketed in the continental United States, without having to struggle for the business, save for the small portions which off-shore territories may refine and market—if they can get the business. The Secretary has argued that these limitations are part of a quota system for refiners (Reply Brief in the court below, p. 2). Yet, neither in Section 207 of the Act, imposing the restraints, nor in Section 101, where terms are defined, is the word "quota" used with reference to "direct consumption sugar". And Section 207 fails to reveal even the outlines of a quota system. The Atlantic refiners are more nearly correct when they insist (Reply Brief in the court below, p. 8) that the limitations upon the off-shore territories are "compensation" to them for limitations which the Act had placed upon their sources of supply. Thus, save for the small quanties specified, Section 207 makes the off-shore territories ineligible to refine sugar for the continental market. It vests, save for these small driblets, the right to refine all sugar to be marketed on the mainland in the continental refiners. In a word the Congress, in grafting an alien provision on the Act, treated the continental market as a proprietary domain, upon which, save for minor concessions, the American off-shore territories were forbidden to trespass.

V. History of the Instant Case.

On January 16, 1948, the Secretary, seeking to secure "an orderly and adequate flow of sugar" and in accordance with Section 205(a) of the Act,* issued Sugar Order No. 18, allocating among the sugar refiners of the island the maximum of 126,033 tons of refined sugar which Puerto Rico was permitted to market on the mainland. On February 11, 1948, the appellants, Central Roig Refining Company and Western Sugar Refining Company, being dissatisfied with the allocations granted them, sought a review of the order, and questioned the power of the Secretary of Agriculture to make it, in the court below.

Thus there was presented to the United States Court of Appeals for the District of Columbia Circuit two legal issues.

1. The first, lesser and more immediate question was whether the allocation for the year 1948 of the direct consumption portion of the sugar quota for Puerto Rico did or did not constitute a "fair, efficient and equitable" distribution in accordance with Section 205(a) of the Act.

2. The second, greater and more enduring question was the authority of the Secretary to issue any allocation order in respect to refined sugar or to appoint any limit to the portion of its sugar quota which Puerto Rico could fill with "direct consumption sugar". In other words it is whether Section 207(b) of the Act, imposing a maximum upon the portion of the sugar quota to be marketed by Puerto Rico within the continental United States which may be filled with refined sugar represents a valid exercise of the power of the Congress.

It is obvious that the two questions are distinct and would have to be separately decided. For if the order was found valid, the authority to issue it would still be in question. And if the accused section was found to be authorized by the Constitution, the issue of conformity to standards in the

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* Unless otherwise specified the word Act refers to the Sugar Act of 1948.

statute would still have to be met. It is true that if Section 207(b) were to be held invalid, the order would fall with it. But if the order were held invalid it would not dispose of the challenge to the validity of the accused section. For a decision adverse to the order could do justice among Puerto Rican refiners only within the confines of the allocable 126,033 tons. If these refiners were to be able, like the mainland refiners, freely to expand their operations, relief could come only from a declaration of the invalidity of the accused section. To avoid the discrimination whereof these refiners and the Government of Puerto Rico complain, the accused section would have to be proclaimed null and void.

In respect to these two issues the lines of legal battle were drawn. The Central Roig and Western Companies confronted the Secretary of Agriculture on both questions. In accordance with Section 205(d) of the Act, the Porto Rican American Sugar Refinery, Inc. and the American Sugar Refining Company, et al. by intervention became parties to the case. On May 24, 1948, under 38(c) of the Rules of the court below, the Government of Puerto Rico sought, and on June 9, 1948, was by the court below granted permission by intervention to become a party to this case. The intervention of the Porto Rican American Sugar Refinery, Inc., was limited to a defense of the order. The American Sugar Refining Company, et al., and the Government of Puerto Rico, professing no interest in the allocation, entered the case, the one to defend and the other to attack the validity of the accused section.

After the presentation of briefs, and an oral argument before Edgerton, Clark and Wilbur Miller, JJ., on November 24, 1948, the court below handed down its judgment. In respect to the narrow question it found that the allocations made by the Secretary in Sugar Order No. 18 were not in accord with the standards set down by Congress in Section 205(a) of the Act. Accordingly, "we must reverse it and remand the case" to the Secretary. In respect to the broader question it made no finding. In the words of the

decision, "a majority of the court are of opinion that since the order is not authorized by the Act we cannot, within established principles of review, undertake to decide whether Section 207(b) of the Act is authorized by the Constitution. All agree that this question has been fully argued, and my own view (that is of Edgerton, the spokesman) is that we should decide it." The failure to decide this larger question is the issue upon which the Government of Puerto Rico here petitions for a writ of certiorari.

VI. The Questions Presented.

The questions presented by the action of the court below, whose judgment this Court is asked to review, are explicit in the Statement and History just recited and require little elaboration here. The dominant issues are three in number.

1. WHETHER, IN A CASE, IN WHICH THE QUESTION IS PROPERLY RAISED, AND WHERE MATTERS OF CONSEQUENCE ARE INVOLVED, A PARTY IN INTEREST IS ENTITLED TO A DEFINITION OF ITS RIGHTS.

In the instant case, a "verified statement of interest, (section 205(d) of the Act) is requisite to becoming a party to the appeal and renew. In its motion to intervene the Government of Puerto Rico presented to the court below such a statement. On the basis of this showing its motion to intervene was granted. It sought such intervention in a dual capacity, (a) in its sovereign capacity, as charged with the formulation and execution of a public policy which was put in jeopardy by the accused section of the Act and the power of the Congress upon which it was claimed to rest; and (b) in its capacity of parens patriae, to make secure against arbitrary legislative discrimination the civil rights of its people, including the ancient liberty of a trade, against arbitrary legislative discrimination.[7] The very substantial

[7] For the right of a political body to sue in such a capacity see *State of Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, and *State of Georgia* v. *Pennsylvania Railroad Co.*, 324 U. S. 439.

interest which led the Government of Puerto Rico to challenge the validity of Section 207(b) of the Act is recited in summary form in pp. 18-21 below

In its opinion the court below gave no adequate reason for its failure to give the answer to which petitioner is entitled. Its only explanation is that, inasmuch as "the order is not authorized by the Act", the court "cannot within established principles of review, undertake to decide whether Section 207(b) is authorized by the Constitution." But it gives no definition of these "established principles of review", and a diligent search through the law reports has failed to disclose them. It is true, of course, that if an administrative order is struck down for failure to conform to the statute, it is not necessary for the court to kill what has already been killed by reciting constitutional objections.

But in the instant case the court below was confronted, not with a single simple question, but with two distinct, even though related, issues. The first question concerned the validity of the allotments under the order; the second, the authority to issue any allocation order. The parties bringing the suit sought a double relief, first a larger share of the 126,033 tons which the Secretary was allocating; second, a freedom from the restriction of the accused section, so that they could refine as much of the quota of 910,000 tons, which Puerto Rico was permitted to market on the mainland, as they could secure in competition with other insular and all continental refiners. The court, in deciding the statutory question insisted that Central Roig and Western should have had more, and Puerto Rican American less of the limited number of tons to be allocated. In refusing to decide the second question, the court failed to state whether Puerto Rican American, as well as Central Roig and Western were free, exercising their constitutional rights, to seek to expand in disregard of the straight-jacket which the Congress had sought to impose upon their operations. By the court's action, a narrow and temporary re-

lief was granted; by its refusal to act a broader and more enduring relief was denied. And the interests of the Government of Puerto Rico and its people were overlooked. If two distinct questions are raised, they remain distinct questions; they do not become a single question because in distinct ways they are concerned with the same administrative order. It is submitted that as an interested party with a substantial interest in a proceeding in which the question has been properly raised, the Government and the people of Puerto Rico are entitled to a definition of their rights.

2. WHETHER OR NOT SUGAR ORDER NO. 18 IS IN CONFORMITY WITH THE STANDARDS LAID DOWN BY THE CONGRESS IN SECTION 205(a) OF THE ACT.

The issue here, involving a clash of claims between private parties, is of no legal concern to the Government of Puerto Rico. It has no desire to play favorites among the persons who claimed allocations, all of whom are its citizens. It sought no intervention in respect to the fairness and justice of the division of a restricted—as it believes an invalidly restricted—market which in Sugar Order 18 the Secretary sought to allocate. Accordingly, it is in no position either to support or to oppose the petition of the Secretary of Agriculture for a writ of certiorari in respect to the statutory question.

It must, however, point out that the enduring question of the shackles imposed upon off-shore sugar refining cannot be answered upon the administrative level. At the time the decision of the court below was made, November 24, 1948, all sugar subject to the order under attack had already been marketed. It was too late to change the allocations for 1948, and there was no practical reason for the Secretary to revise his order. Nor was there anything upon which the order after revision could take effect. The court's judgment is wholly moral; it is an admonition to the Secretary in shaping the orders for 1949 and subsequent years to be more careful to insure that the allotments

meet the standards in the Act. But each year demands its own order; and there is no compulsion upon the Secretary in the decision rendered to avoid the infirmities of an outlawed order in writing one to meet the different circumstances of a subsequent year. Moreover the sequence of administrative hearing, order, petition to the United States Court of Appeals for review, hearing and decision, and a possible appeal to this Court are likely to consume the greater part or even the whole of the year. Meanwhile all the sugar is marketed under an order which is presumed to be valid. And, when validity or invalidity is finally determined, it is too late for a revised order to correct error and to give real relief.

The dominant issue is the constitutional question; the dominant complaint, alike by private parties and by the Government of Puerto Rico, is against the wall to block expansion which the Congress has erected about the refining business. If the ruling of the court below is sustained, then all parties in interest must wait until the Secretary issues an order free from statutory attack before the United States Court of Appeals for the District of Columbia which has exclusive jurisdiction to review sugar orders will under "established principles of review" consider the constitutional question. It is a disservice to all parties who have a stake in the industry to wage a petty and protracted legal campaign along the administrative front. The validity of Section 207(b) is the heart of the controversy and we submit that Judge Edgerton was right in insisting that the court below should have passed upon it.

3. WHETHER OR NOT SECTION 207(b) OF THE ACT IS AUTHORIZED BY THE CONSTITUTION.

The issue, as presented to the court below, is one of first impression. Its exact parallel was pointed out, neither in briefs now in oral argument, by any part to the case. An authoritative answer to the question raised can be given only by this Court.

In a position for a writ of certiorari the demand is to point out the importance of the question, not to expound arguments and cite authorities which must be considered in its decision. This petition as a whole is intended to show the legal significance of the constitutional question and its vital importance to the Government and people of Puerto Rico. As for the legal issue of the validity of the accused section, it is enough to say that in the court below both the appellants and the petitioner found it necessary to consider many clauses in the Constitution, and to review a host of decisions of this Court, as well as to make excursions into Spanish and British constitutional law. And, while petitioner is firmly persuaded that the Constitution, the authorities, and the cases sustain its position that the accused section is invalid, it has great respect for the able arguments to the contrary advanced by the Secretary and by the American Sugar Refining Company, et al.

A brief summary of the argument presented by the Government of Puerto Rico will indicate alike the importance of the question and the range of legal issues which it touches off.

A. The citizens of Puerto Rico are citizens of the United States and as such possess all the rights and liberties guaranteed to persons and to citizens by the Constitution, including the ancient and established right of a trade.

a. The people of Puerto Rico were while under Spanish rule established in the basic rights and liberties which are the heritage of all free peoples.

b. The United States, in occupying the territory of Puerto Rico, was quick to recognize the established rights and liberties of its people.

c. To the citizens of Puerto Rico have been extended all the rights and liberties which attach to citizensihp in the United States.

d. The liberty of a man to, and within, his trade is among the oldest and best established of our liberties; its protection is grounded alike in the common law, in the anti-trust acts and in the due process clauses of the Constitution.

B. The accused section, in violation of the due process clause of the Fifth Amendment, abridges the liberty of the trade of citizens of the United States who live and work in Puerto Rico for the benefit of citizens of the United States who live and work on the mainland.

a. The liberty of the person to and within his trade can be denied or abridged only by due process of law, that is by the exercise of the police, or regulatory, power to serve a public purpose.

b. Raw sugar, under the operation of the free and open market, proved to be an industry in distress and the Congress was within its powers in using legislation with fairness to all interests to abate the disorder attending its production.

c. The accused section is not an integral part of the Sugar Act, draws no support from the rationale which sustains that Act, and lacks justification as an exception to the general rule of a person's liberty to and within his trade.

d. The real purpose of the accused section, which denies liberty and property to citizens of Puerto Rico without due process of law is to confer a privilege upon the continental refiners at the expense of the refiners in Puerto Rico.

e. The accused section of the Act abridges the liberties of citizens of the United States solely because they reside or transact business in Puerto Rico.

C. The accused section of the Act derives no sanction, justification or excuse from the power conferred upon the Congress to regulate the territories.

a. The accused section is not sanctioned, justified or excused by the power over the territories delegated by the Constitution to the Congress.

b. The ordinance of 1787 for the good government of the Northwest Territory, which has served as the model in formulating a political order for a territory of the United States, gives no support to the contention that the power of the Congress over the territories is absolute plenary or irresponsible.

c. The courts, in their construction and application, have refused to hold that the power of the Congress over a territory is absolute, plenary or irresponsible.

d. The power of the Congress to enact the accused section can draw no validity from the still incomplete incorporation of Puerto Rico in the body politic known as the United States of America.

D. Section 207(b) of the Act runs directly contrary to the very intent and spirit of the Constitution.

a. The accused section of the Act encounters perils from many specific clauses in the Constitution.

b. No power to strip one group of United States citizens of the right to compete and to vest the business in another group of citizens in the same industry has been delegated to the Congress by the Constitution.

E. The Congress is endowed with no power to impose upon the people of Puerto Rico, in whole or in part, a colonial system, or to reduce that territory to the status of a colony.

a. The attempt of the thirteen colonies to escape the restrictions of the old colonial system created the climate of opinion within which the Constitution was framed.

b. The Constitutional Convention, after adequate deliberation, rejected a colonial status for the people of any territory belonging to the United States.

c. It is settled law that no power has been conferred upon the Congress to impose a colonial status upon any group of citizens of the United States.

It is submitted that the instant case, affecting the status of Puerto Rico and of its citizens, is the most important case affecting our off-shore territories which has come before this court since the decision of *Downes* v. *Bidwell*, 182 U. S. 244.

VII. Reasons For Granting the Writ.

The compelling reasons for granting the writ have been recited in the paragraph above. Under this caption it remains only to add a point or two not yet covered and con-

cretely to recite the interest of the Government of Puerto Rico in the case.

1. THE FAILURE OF THE COURT BELOW TO DECIDE THE CONSTITUTIONAL QUESTION IMPOSES NO BAR TO, AND IN NO WISE MAKES MORE DIFFICULT, ITS CONSIDERATION BY THIS COURT.

It is understandable that, in the performance of its appellate office, this tribunal as a usual rule demands that the matter in issue be first processed by a lower court. The rule is salutory, and in most instances contributes to wider knowledge, sharper analysis, and more informed judgment. The instant case presents the clear exception to the rule. Here the facts are fully presented and none of them are in dispute. Here the parties are all in agreement as to the statutory and the constitutional questions which are involved; the questions are stated by the adverse parties in almost the same words. The constitutional question presents a series of issues at law which must be resolved by oral argument and the presentation of briefs; and ultimately it must be resolved by this Court. As the opinion below states, the issue of the validity of the accused section has already been "fully argued". In any event, as this court meets the constitutional issue—whenever and in whatever form the challenge reaches it—these arguments, perhaps with revisions, will have to be repeated before it. Since the case already presents a clear-cut constitutional issue, entirely uncomplicated by other considerations, this court is as well prepared to entertain the issue as if the court below had expressed an opinion upon it.

2. THE ESTABLISHED PRINCIPLES OF SOUND JUDICIAL ADMINISTRATION DEMAND THE TIMELY DISPOSITION OF THE CONSTITUTIONAL ISSUE.

It has been impossible, in drafting this petition, to follow the conventional form. The conflicting opinions of two circuits cannot be cited, when no circuit court has passed upon the validity of the accused section. The court below cannot

be accused of deciding in the face of the authorities when it has made no decision at all. And, if no case exactly in point* can be cited for asking this tribunal to resolve the issue when the lower court has refused to do so, no case to the contrary can be cited. Nor can it truthfully be said that the Government of Puerto Rico has no recourse left save an appeal to this court.

But it can be truthfully said that the question is of the utmost importance; that the public interest, as well as that of private parties, demands an early judgment; and that ultimately that judgment must be made by this Court. It is possible, of course, to raise the question in an appeal from the Sugar Order for 1949; but that appeal has to go to the court below and that court has expressed its unwillingness to touch the constitutional issue if the order being reviewed is challenged on statutory grounds. A corporation belonging to the Government of Puerto Rico might attempt to ship refined sugar in excess of the limitation, be denied the privilege by the customs officials, and seek an injunction based upon the invalidity of the accused section. But such a shipment would have to be made late in the year; and even then, for one reason or another, less than 126,033 tons might have been marketed, and as a result the cargo would go through without challenge. Or the Land Company, a wholly-owned corporation of the Government of Puerto Rico, which owns a number of centrals, might decide to refine the sugar which it produces, seek a loan from the Government's bank, and in court, in advance of investment, ask for a declaratory judgment of its rights. There are, apart from intervention in a private suit, a number of other ways in which the petitioner might raise anew the question which it is now presenting to this Court.

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* A close parallel is *Federal Trade Commission* v. *Goodyear Tire and Rubber Co.*, 304 U. S. 252, involving Section 2, the "quantity discount provision in the Clayton Act." The Sixth Circuit had refused to decide the question before it, and the Supreme Court in a memorandum opinion remanded the case with a directive "for a determination of the merits."

But recourse to any such procedure would be time-consuming; and in the end could do no more than confront this Court with the exact issue which is now being presented to it. In the instant case that issue has been properly raised; delay can accomplish nothing more than bring bother, inconvenience, uncertainty and loss to all parties in interest. It is submitted that sound judicial administration demands that the issue be now met and properly decided.

3. ABOVE ALL THE INTERESTS OF THE GOVERNMENT AND THE PEOPLE OF PUERTO RICO WILL BE PUT IN JEOPARDY BY A DELAY IN REACHING A FINAL JUDGMENT UPON THE VALIDITY OF THE ACCUSED SECTION.

The Government of Puerto Rico has an interest in this case far greater than that of any of the private parties. It sought to intervene because it is under obligation to develop its agriculture, industry and commerce; to link the insular with the continental economy; to raise the standard of life of its citizens to a minimum of decency; and to rescue its people from a plight which would bring disaster to a less resolute and resourceful population. It has formulated and is putting into effect a public policy, embracing a number of measures, through which it hopes to realize these objectives. But its whole program is put in jeopardy, if this Court holds that the Congress has power to pass the kind of Act represented by the accused section.

Puerto Rico is a territory of the United States. It is eight flying hours from New York City. It is only 100 miles long and 35 miles at the widest. Not more than one-third of its territory is arable land, and of this a large part is marginal. In this confined area a population of 2,200,000 is crowded. The population density is 600 per square mile, fifteen times as great as that of the United States. Agriculture cannot be made intensive enough to support so many people. It must, if it is to survive, export the labor of its people in the form of "value added by manufacture;" and the higher the skill which go into the goods it sends to the mainland, the greater the volume and value of the products

it receives in return. In a word, there is no salvation for Puerto Rico but in industrialization and commerce with the continent.

The island was ceded by Spain to the United States in 1898. Its dominant language is still Spanish, although almost all in the higher income groups also speak English. Its Spanish tradition is slowly yielding to American ways; and its economy, closely linked with that of Spain at the turn of the century, is now oriented to the United States. Although the government spends one-half of its income on education—a higher percentage than any state in the Union—facilities for learning are still inadequate and the illiteracy rate is still high. The people are highly endowed with potential skills, and training in the industrial arts is bringing out latent talents. The people of Puerto Rico, under the Organic Act as amended are citizens of the United States, endowed with all the rights and privileges of United States citizenship.

The island's economy—the ways and means of life for its people—has by tradition been agricultural. The dominant crop and the first source of income is raw sugar. Next comes the distilling and sale of rum. Then comes tobacco, pineapples and coffee, now a declining industry. But even the new agriculture, resting upon fruits, vegetables and cut flowers of high quality and value, cannot support a population of such density. Although to some extent the pressure of the people upon the land is being relieved by migration to the continent, there must be a shift—a rapid and extensive shift—to a refining, processing, manufacturing base, if the island is to support its population.

In view of this situation, the Government of Puerto Rico has recently embarked upon a comprehensive program for promoting new crops, bringing factories to the island, stimulating trade, and forming "a more perfect union" with the continental United States. To that end it has made a survey of its economic potential, revised its pattern of taxation, set up agencies of government to execute its program, and invested large sums of money in its industrial future.

In the policy of the government expanding opportunity for employment has come to be a first necessity. Section 207(b) of the Act—and the reputed power of the Congress on which it rests—put in serious jeopardy the whole of the Government's program.

The Government of Puerto Rico has an interest in resisting—and a duty to resist—every attempt to arrest its industrial development, to drive it back upon agriculture, to fasten upon it a colonial status. Its citizens are citizens of the United States and it is under obligation to see to it that equality is preserved, that discrimination is avoided, that the rights and privileges of its citizens—including the ancient liberty of a trade—are not denied or abridged to the benefit of other citizens of the United States who happen to live and do business on the mainland. The distance of the island from the continent—ranging from 1200 to 1800 miles—and the inheritance of a Spanish culture—impose serious obstacles to the full incorporation of Puerto Rico into the federal union known as the United States of America. The Government of Puerto Rico is under a duty to support every measure which makes for, and opposing every measure which works against, such a development of the island, its culture and its people as will enable it as early as possible to take its rightful place in our political system. Above all, it is under a duty to see to it that in a modern return to the old colonial system, the Congress does not appoint Puerto Rico to the office of producing raw materials for mainland manufacture.

In a word, the future of Puerto Rico and its people rests on the judgment passed upon Section 207(b). For if the Congress can limit the amount of sugar which in refined form the people of the island are permitted to market on the mainland, it can decree—as it has already done for the Virgin Islands—that Puerto Rico can market on the continent no sugar ready for direct consumption. And, if in respect to sugar, the Congress can limit the mainland market to the raw product, it can do the same thing in other industries, and impose a direct prohibition against the processing, refining and manufacture of any finished commod-

ity on the island—save for local consumption. The fate, therefore, of insular industries devoted to such products as cement, plyboard, furniture, textiles, distilled spirits, and glass containers, is tied up in the present case.

4. THE CITIZENS OF PUERTO RICO, WITHOUT ACCESS TO THE FEDERAL POLITICAL PROCESS, HAVE NO RECOURSE SAVE TO THE COURTS FOR THE PROTECTION OF THEIR RIGHTS.

In respect to all such matters Puerto Rico has no access to the political process. Its two and a quarter million people possess no Senators or Representatives. In the Congress the territory has only a Resident Commissioner, who by the courtesy of that body—there is no law on the subject—is indulged a seat in the House of Representatives but has no vote. As "a discreet and insular minority,"[9] without recourse to the Congress, the people of Puerto Rico must depend upon the courts to vindicate their rights as American citizens.

CONCLUSION.

It is submitted that in the instant case a writ of certiorari should be issued addressed to the United States Court of Appeals for the District of Columbia Circuit; and that this Court should, after due and proper procedure, pass upon the validity of Section 207(b) of the Sugar Act of 1948, or in the alternative remand the instant case to the above-mentioned court with a directive to decide whether or not the accused section is authorized by the Constitution.

Respectfully submitted,

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[9] See the classic "Footnote 4" in the opinion of Mr. Justice Stone, in *U. S. v. Carolene Products Co.*, 304 U. S. 144.

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SUPREME COURT, U. S.

NOS. 575, 580, AND 585.

IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1946~~ '47

~~No. 575~~ 27

SECRETARY OF AGRICULTURE, *Petitioner*,

v.

CENTRAL ROIG REFINING COMPANY and WESTERN SUGAR REFINING COMPANY, *Respondents*; PORTO RICAN AMERICAN SUGAR REFINERY, INC., *Intervenor*; THE AMERICAN SUGAR REFINING COMPANY, ET AL., *Intervenors*; and THE GOVERNMENT OF PUERTO RICO, *Intervenor*.

~~No. 580~~ 30

PORTO RICAN AMERICAN SUGAR REFINERY, INC., *Petitioner*,

v.

CENTRAL ROIG REFINING COMPANY and WESTERN SUGAR REFINING COMPANY, *Respondents*.

~~No. 585~~ 32

THE GOVERNMENT OF PUERTO RICO, *Petitioner*,

v.

THE SECRETARY OF AGRICULTURE, PORTO RICAN AMERICAN SUGAR REFINERY, INC., THE AMERICAN SUGAR REFINING COMPANY, ET AL., CENTRAL ROIG REFINING COMPANY, and WESTERN SUGAR REFINING COMPANY, *Respondents*.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS CENTRAL ROIG REFINING COMPANY AND WESTERN SUGAR REFINING COMPANY IN OPPOSITION TO NOS. 575 AND 580 AND IN SUPPORT OF NO. 585.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 575.

SECRETARY OF AGRICULTURE, *Petitioner*,

v.

CENTRAL ROIG REFINING COMPANY and WESTERN SUGAR REFINING COMPANY, *Respondents;* PORTO RICAN AMERICAN SUGAR REFINERY, INC., *Intervenor;* THE AMERICAN SUGAR REFINING COMPANY, ET AL., *Intervenors;* and THE GOVERNMENT OF PUERTO RICO, *Intervenor.*

No. 580.

PORTO RICAN AMERICAN SUGAR REFINERY, INC., *Petitioner*,

v.

CENTRAL ROIG REFINING COMPANY and WESTERN SUGAR REFINING COMPANY, *Respondents.*

No. 585.

THE GOVERNMENT OF PUERTO RICO, *Petitioner*,

v.

THE SECRETARY OF AGRICULTURE, PORTO RICAN AMERICAN SUGAR REFINERY, INC., THE AMERICAN SUGAR REFINING COMPANY, ET AL., CENTRAL ROIG REFINING COMPANY, and WESTERN SUGAR REFINING COMPANY, *Respondents.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

This brief of Central Roig Refining Company and Western Sugar Refining Company, respondents here and appellants below, is filed in response to the three petitions for

writs of certiorari to review the judgment (R. 198) of the United States Court of Appeals for the District of Columbia Circuit as follows: In No. 575, by the Solicitor General on behalf of the Secretary of Agriculture, appellee below; in No. 580 by Porto Rican American Sugar Refinery, Inc., intervenor below; and in No. 585 by the Government of Puerto Rico, intervenor below. Service of the printed copy of the record was made February 25, 1949, on Roig and Western. They are hereinafter referred to as the "respondents".

OPINION BELOW.

The opinion of the Court of Appeals for the District of Columbia Circuit delivered November 24, 1948 (R. 194-197), is reported in 171 F. 2d 1016.

JURISDICTION.

Petitioners invoke the jurisdiction of this Court under § 1254, title 28, U. S. C.

QUESTIONS PRESENTED.

First, whether Puerto Rico Sugar Order 18 (R. 160-175) is invalid in that it is based on § 207(b) of the Sugar Act of 1948 which, by reason of the refined sugar quota it imposes on Puerto Rican refiners, grossly discriminates against respondents and in favor of the mainland seaboard refiners in violation of the due process clause of the Fifth Amendment.

Second, whether Order 18 is invalid in that it allots the Puerto Rican refined sugar quota contrary to the requirements of § 205(a) of the Sugar Act of 1948.

The case thus involves a constitutional question and a statutory question. Respondents' position is that if writ of certiorari is granted by this Court to review the statutory question, as petitioned by the Secretary of Agriculture and Porto Rican American Sugar Refinery, Inc., this

Court cannot fully dispose of the case without deciding the constitutional, as well as the statutory, question. This follows since a decision affirming the judgment below in favor of respondents on the statutory question, but leaving the constitutional question undecided, grants respondents only a portion of the relief sought by them. On the other hand, if writ of certiorari is granted on the constitutional question as petitioned by the Government of Puerto Rico, then a decision by this Court in favor of respondents on the constitutional question would grant respondents all the relief sought by them, including that based on the statutory question.

STATUTE INVOLVED.

The statute involved is the Sugar Act of 1948 (61 Stat. 922-933, 7 U.S.C., Supp. I, 1100-1160). Sections 207(b) and 205(a) thereof appear on pages 4 and 5 of the petition filed in No. 575 on behalf of the Secretary of Agriculture.

STATEMENT.

The statements of the three petitioners omit, or fail to give proper emphasis to, certain facts believed by respondents to be essential to adequate consideration of the petitions. The following restatement is therefore made:

1. *Facts Bearing on the Constitutional Question.*—Under § 201 of the Sugar Act of 1948 (referred to herein as the "Act") the Secretary of Agriculture determined on January 9, 1948, that for the year 1948, there were needed 7,800,000 tons of sugar to meet the requirements of consumers in the continental United States.[1] The Act assigns quotas for supplying this tonnage among five domestic sugar areas and Cuba and other foreign countries. The

[1] 13 F. R. 132. Later in the year this amount was redetermined to be 7,500,000 tons (13 F. R. 1145-1146, March 3, 1948), then 7,000,000 tons (13 F. R. 2948-2949, June 2, 1948), and finally 7,200,000 tons (13 F. R. 4473, August 4, 1948).

five domestic sugar areas are (1) the domestic beet sugar area (Ohio, Michigan, Nebraska, Montana, Idaho, Wyoming, Colorado, Utah, California, and other states), (2) the mainland cane sugar area (Louisiana and Florida), (3) Hawaii, (4) Puerto Rico, and (5) the Virgin Islands. For the five domestic sugar producing areas the respective quotas are flat amounts specified in § 202(a) of the Act, plus certain "deficit" amounts computed under § 204. The flat amount for Puerto Rico is 910,000 tons. Through computation of various deficits arising from the inability of the domestic beet sugar and the Hawaiian areas to meet their quotas, Puerto Rico's sugar quota for 1948 was increased by December 3, 1948, from 910,000 tons to a total of 1,023,756 tons.[1]

Section 207(b) of the Act limits Puerto Rican refiners to marketing only 126,033 tons of its sugar quota in refined form.[2] Thus in 1948 Puerto Rican refiners could market only 126,033 out of 1,023,756 tons, or approximately 12% of its quota, in refined form. The remaining 897,723 tons or 88% of the Puerto Rican sugar quota, if marketed at all, is thus compelled to be shipped to the ten intervening and other mainland seaboard refiners for refining by them. No corresponding limitation is imposed on the domestic beet sugar area or the mainland cane sugar area. They may market all their sugar in refined form. Denial to Puerto Rican refiners of the right to ship to the mainland

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[1] 13 F. R. 7631-7633.

[2] The Act actually says in the form of "direct consumption sugar." Direct consumption sugar is of three kinds, refined, turbinado (i. e., semi-refined), and direct consumption raw sugar (i. e., raw sugar used for industrial purposes without further refining or improvement in quality as in the manufacture of tobacco products). Very little of Puerto Rico's sugar quota is marketed in the form of turbinado or direct consumption raws and as the Court of Appeals stated for the purposes of the present case " 'Direct consumption' sugar means approximately refined sugar."

in the form of refined sugar of approximately 88% of its quota raw sugar deprives the Island and its refiners of the opportunity to compete for an additional income of around $19,000,000 a year, as estimated by the Secretary of Interior as recently as April 7, 1948.[1] The deprivation creates a corresponding gain in the income of the mainland refiners.

The quota and allotment powers of the Secretary of Agriculture as provided in the 1948 Act expire December 31, 1952 (§§ 411 and 412). Similar powers have been vested in the Secretary of Agriculture since 1934 by the Sugar Act of 1934 (Jones-Costigan Act),[2] and the Sugar Act of 1937 and extensions thereof.[3]

Prior to the enactment of the 1934 Act, *both* mainland refiners and Puerto Rican refiners had the right to buy raw sugar supplies anywhere in the world, in any quantity, and to compete for the entire mainland refined sugar market. Under the 1948 Act (as well as the prior Acts) *both* mainland refiners and Puerto Rican refiners in marketing on the mainland are limited to marketing *quota* sugar, i.e., sugar within the aggregate of the domestic and foreign area quotas for sugar to be consumed in the continental United States, fixed finally for 1948 at an aggregate of 7,200,000 tons. *Both* are denied access to non-quota sugar.

On the other hand, the 1948 Act (as well as the 1937 Act) imposed on Puerto Rican refiners a limitation not imposed on mainland refiners. Thus the Act gave mainland refiners in 1948 the right to refine and market on the mainland all quota raw sugar they could acquire within the 7,200,000

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[1] Hearings on H. R. 5876 before the Subcommittee of the Committee on Public Lands, House of Representatives, April 1948, quoted on p. 14, below. See also H. Rept. No. 2035, 80th Cong., 2d Sess.

[2] 48 Stat. 670, validated 49 Stat. 1539.

[3] 50 Stat. 903, extended by 54 Stat. 1178, 55 Stat. 872, 58 Stat. 283, and 60 Stat. 706.

ton aggregate while Puerto Rican refiners were permitte to compete for the refining and marketing on the mainlan of only 126,033 tons of that sugar. Stated another wa mainland refiners have under the Act the right to refi and market not only all quota raw sugar they are able t acquire from sources outside Puerto Rico, but also ar given a monopoly of the refining of all save 126,033 tons Puerto Rico's 1,023,756 tons of quota raw sugar. Furthe they may legally compete with Puerto Rican refiners eve for the refining of the 126,033 tons.[1] The same situatio existed under the 1937 Act save for periods during whic the President suspended quotas.[2]

What respondents seek primarily is the opportunity t compete with the mainland refiners for the refining an marketing of the whole of Puerto Rico's quota of suga for mainland consumption, not merely 12% of it, and t set aside the mainland refiners' statutory monopoly ov the other 88%.

Respondents contend that section 207(b) of the Ac designed to produce the results described above, grossl discriminates against Puerto Rican refiners, including re spondents, and grossly discriminates in favor of the mai land refiners, including the ten intervening mainland sea board refiners, and that by so doing the section violates th

[1] There is also a small separate quota for local consumption Puerto Rico of around 90,000 tons annually (§ 203 of Act). Mai land refiners may also compete with Puerto Rican refiners for th refining and marketing of this sugar.

[2] The quota provisions were law throughout the period 1937-194 inclusive, under the 1937 Act, save from March 1 to October 1 1940, pending enactment of extension legislation by Congress. How ever, the quota provisions were suspended by proclamations of th President, pursuant to § 509 of the 1937 Act (50 Stat. 916), fo the period from September 11, 1939, to December 26, 1939 (3 CFR 1939 Supp. 69 and 83), and for the period from April 13, 1942, t November 28, 1947 (3 CFR, Cum. Supp. 300 and 12 F. R. 801 December 2, 1947).

due process clause of the Fifth Amendment and gives rise to the constitutional question in this case. The constitutional validity of the general sugar quota provisions of the Act for the relief of the farmers and raw sugar producers is not questioned. Only the refined sugar limitation in section 207(b) granting special privileges to mainland refiners, is questioned as to its constitutional validity.

2. *Facts Bearing on the Statutory Question.*—Section 205(a) of the Act requires "fair, efficient, and equitable" allotments of Puerto Rico's refined sugar quota of 126,033 tons. But such allotments may be arrived at only "by taking into consideration" the three statutory standards of proportionate shares, past marketings, and ability to market.

In Puerto Rico Sugar Order 18 the Secretary made allotments to six allottees (R. 175). Of the six allottees only Porto Rican American, Roig, and Western are primarily refiners and as such compete with the large mainland sugar refiners on the eastern seaboard. On the other hand, Central Aguirre, Central Guanica, and Central San Francisco are primarily producers of raw sugar, not refiners, and as such are not competitors with the mainland sugar refiners, but on the contrary, sell raw sugar to them and are sources of raw supply for them. The following table, prepared from Government figures, sets forth the situation statistically for the calendar year 1947:[1]

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[1] Exhibit B and Exhibit B1, No. 53, issued January 16, 1948, Caribbean Area Office, Production and Marketing Administration, U. S. D. A.

1. Allottee	2. Own Raw Sugar Produced	3. Outside Raw Sugar Purchased (Col. 4 less Col. 2)	4. Total Refined Sugar Produced	5. Refined Sugar Marketed in States	6. Refined Sugar Marketed in Puerto Rico
		(All figures in tons)			
Porto Rican American	63,640	24,519	88,159	60,175	28,303
Roig	48,649	.....	48,228	27,274	20,965
Western	45,978	3,555	49,533	30,801	18,807
Aguirre	107,774	.....	10,336[a]	10,300[a]	36[a]
Guanica	94,551	.....	17,156	.....	17,156
San Francisco	6,643	.....	1,401[a]	1,344[a]	58[a]

[a] Turbinado sugar.

Respondents, Roig and Western, and intervenor Porto Rican American, who are parties to this case, are obviously the refiners principally interested in the Puerto Rican refined sugar quota. Aguirre, Guanica, and San Francisco are not parties to this case.

In making the allotments under Order 18 the Secretary gave no weight to the statutory standard of proportionate shares. He gave 50% weight each to the other two statutory standards of past marketings and ability to market. The Secretary measured the past marketings by skipping back over the years 1947 to 1942 and using each allottee's average marketings of refined sugar on the mainland for the highest five years during the 7-year period from 1941 back to 1935, inclusive (R. 174). He measured ability to market by each allottee's highest single year's marketings of refined sugar on the mainland during the period 1947 back to 1935, inclusive. Porto Rican American's ability to market in 1948 was thus measured by its marketings in 1935.

All these interpretations of the three standards worked to the detriment of Roig and Western and to the advantage of Porto Rican American. Actually the Secretary was applying an extra-statutory standard of restoration of "prewar competitive relationships" among Puerto Rican refiners (R. 158-9, 6, 29, 31) and thereby restoring and re-

inforcing the prewar monopoly of Porto Rican American among Puerto Rican refiners.

These interpretations in Order 18 of the three statutory standards resulted in allotments for 1948 to the three Puerto Rican refiners as follows (R. 175):

Allottee	1941 Marketings (tons)	1948 Allotments (tons)
Porto Rican American	79,237	79,258
Roig	15,028	16,698
Western	13,017	14,772

The comparison above between 1941 and 1948 shows clearly that the Secretary did by Order 18 succeed in restoring prewar competitive relationships.

Following notice and hearing the Secretary formulated Order 18 without first issuing a tentative or recommended decision and affording opportunity for exceptions and on January 22, 1948, made Order 18 public and immediately effective (13 F.R. 310). On February 5, 1948, Roig and Western filed with the Secretary a Petition for Stay and Reconsideration of Order, in which they requested an opportunity to argue orally or by brief questions of law relating to the validity of the Order, including the constitutional and statutory questions presented by this case (R. 176-178). The petition was denied (R. 178-9). Roig and Western, having exhausted all administrative remedies, appealed to the United States Court of Appeals for the District of Columbia Circuit under section 205(b)-(f) of the Act and section 10 of the Administrative Procedure Act (§1009, title 5, U.S.C.), raising in their Notice of Appeal and Petition for Review both the constitutional and the statutory questions (R. 180-182).

The Court of Appeals unanimously reversed the Order and remanded the case to the Secretary on the ground that the Secretary had erroneously interpreted and applied section 205(a) of the Act and each of the three allotment standards therein provided. On the statutory question the

Court held that the Secretary acted contrary to law by failing to give any weight to the standard of proportionate shares, by measuring ability to market in the case of some allottees by past instead of current ability, and by excluding marketings within the last half dozen years in measuring past marketings. But the Court (Justice Edgerton who wrote the opinion disagreeing) failed to decide the constitutional question, stating that—

> "A majority of the court are of opinion that since the order is not authorized by the Act we cannot, within established principles of review, undertake to decide whether §207(b) of the Act is authorized by the Constitution. All agree that this question has been fully argued, and my own view is that we should decide it." (R. 194-197)

ARGUMENT.

A. Position of the Respondents.

1. Respondents' position as to review of the statutory question.

In Nos. 575 and 580, to the extent that the petitions seek review of the statutory question to the exclusion of the consitutional question, respondents oppose the granting of the writs petitioned for by the Secretary of Agriculture and by Porto Rican American. At the same time, respondents call attention to, and agree with, the statement in the Secretary's petition that this case "involves an important constitutional issue" (p. 25). They further agree with the statement that, if the Secretary's interpretation of the statutory standards is in accordance with law, "the constitutional issue will need to be decided" (p. 25).

However, even if the Secretary's interpretation of the statutory standards is contrary to law (as urged by respondents and held by the Court of Appeals), the constitutional question will still need to be decided. The fact that the Secretary does not specifically bring the constitutional question forward in his petition under the heading

"Questions Presented", does not prevent it from being properly before this Court. It was raised, briefed, and as the opinion states, "fully argued" in the court below. In such circumstances, respondents are entitled to urge in *support of the judgment below*, any matters appearing in the record.[1] It is, then, respondents' position and purpose to support the judgment below, not only on the ground that such judgment annulling Puerto Rican Sugar Order 18 is correct as a matter of statutory interpretation, but also on the ground that the judgment is correct in that, the statutory provision under which Order 18 was issued being unconstitutional, the Secretary had no authority to issue any order at all.

2. Respondents' position as to review of the Constitutional question.

Respondents support the petition of the Government of Puerto Rico in No. 585.

B. Reasons for Granting Writ to Review the Constitutional Question.

This case cannot be fully disposed of without a decision on the constitutional question raised below by respondents. Even if the statutory question be decided in their favor (as was done in the court below), the relief is only part of what they seek. That is to say, a decision in their favor on the statutory point gives them relief *within* the refined sugar quota but fails to decide whether they are entitled to be relieved *from* that quota limitation altogether. Their

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[1] *Langnes* v. *Green*, 282 U. S. 531; *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555; *Public Service Commission of Puerto Rico* v. *Havemeyer*, 296 U. S. 506; *Helvering* v. *Lerner Stores Corporation*, 314 U. S. 463.

The constitutional question was raised by respondents in their Petition for Stay and Reconsideration of Order before the Secretary of Agriculture (R. 177) and in their Notice of Appeal and Petition for Review (R. 182).

constitutional point is that they are entitled to the latter. The difference is the right of a Puerto Rican refiner to compete with mainland refiners only within his allotted share of 126,033 tons as against the right to compete with the mainland refiners for Puerto Rico's entire sugar quota which for 1948 was 1,023,756 tons.

The constitutional question raised in this case—whether §207(b) of the Sugar Act of 1948 violates the due process clause of the Fifth Amendment in that it grossly discriminates against Puerto Rican refiners and in favor of the mainland seaboard refiners—is one of general importance; it is of substance relating to the construction and application of the Constitution of the United States; it has not been, but should be, settled by this Court.

The general importance of the question seems clear. It has to do with the relationships between insular possessions and the United States, and more particularly with the nature and extent of the power of Congress over commerce between Puerto Rico and the States and the limitations upon such power. Basically, the question is whether that commerce is protected by due process of law against arbitrary discrimination by Congress. While respondents' litigable interest may be restricted to the adverse effect of section 207(b) of the Act on rgspondents themselves, they point out that this adverse effect extends to Puerto Rico as a whole; their fate is thus involved along with the fate of the Island. The larger interests of the Island are set forth in the petition of the Government of Puerto Rico in No. 585.

The question relates to the construction and application of the Constitution. Indeed, respondents put their objection in the court below, and renew it here, specifically on the ground that the refined sugar quota provision of section 207(b) of the Sugar Act of 1948 violates the due process clause of the Fifth Amendment in that it grossly discriminates against Puerto Rico and its refiners, including

respondents, and in favor of the mainland seaboard refiners.

Arbitrary discrimination is what the respondents complain of. They do not seek relief on the theory that due process of law imposes a judicially enforceable substantive limitation on legislative power in the regulation of economic affairs; they freely admit that Congress has a large power to regulate commerce between Puerto Rico and the States. They invoke, rather, judicial protection against arbitrary discrimination in the exercise of that power. Just as this Court strikes down state laws which discriminate against national interests in interstate commerce so should it strike down Congressional laws which discriminate against local interests in such commerce. If Congress were to single out a State of this Union and fix an arbitrary and grossly discriminatory quota on the amount of its cotton, oil, beets or cane which could be sent, in manufactured or refined form, to other States, there would be little doubt that the quota would fall. Despite the absence of an equal protection clause running against Congress (cf. the Fourteenth Amendment against the States), it has never been denied that due process includes such an indispensable attribute of freedom as equality before the law. *Truax* v. *Corrigan*, 257 U.S. 312, 331-332; *Steward Machine Company* v. *Davis*, 301 U.S. 548, 585.

The refined sugar quota of 126,033 tons, as fixed by statute, is an arbitrary and capricious figure. The Sugar Acts of 1934, 1937, and 1948, show, on the one hand, that Puerto Rican refining is frozen at the level of the depression year 1933, and on the other, that the mainland refiners are unrestricted, that they may refine and market all the quota sugar they can acquire and are given a monopoly of the refining of 88% of Puerto Rico's quota sugar. The mainland refiners may expand with increased population, improved economic conditions, and other demand factors. The debates in Congress at the time of passage of the 1937 Act show the arbitrary character of the discrimination;

the Department of Agriculture itself has used the strongest sort of language to the same effect; the President and the Secretary of the Interior denounced it as arbitrary. (All of the foregoing was developed in respondents' briefs in the court below and will be set forth more fully in presenting this case on the merits if the petitions are granted.) As recently as April 7, 1948, the Secretary of the Interior wrote the Chairman of the Committee on Public Lands, House of Representatives, as follows:

> " . . . An example of such a discriminatory provision is to be found in subsection (b) of section 207 of the 'Sugar Act of 1948' . . . This provision limits the amount of refined sugar which Puerto Rico may ship to the continental United States, a limitation which does not apply equally to the several states, and thus treats Puerto Rico as though it were not a part of the United States, but a foreign country. It has also proved to be detrimental to the insular economy having cost Puerto Rico, between the years 1934 and 1946, an estimated $220,000,000 in revenue. If this provision were repealed and Puerto Rico were allowed to market its sugar in a refined state, Puerto Rico would realize an additional $18,000,000 to $19,000,000 a year and would benefit from a resulting increase in job opportunities, more consumer income, and greater industrial development." [2]

That arbitrary discrimination is the pervading issue in this case becomes even more plain when other related matters are noted which, while interesting and important in themselves, are *not* now involved. For one thing this case is *not* concerned with the *foreign* commerce of Puerto Rico, that is, commerce with *foreign* nations, e.g., Argentina, nor is it concerned with the *foreign* commerce of the United States. Neither is it concerned with *local* commerce on the Island. For another, it does *not* involve any requirement

[2] Hearings on H. R. 5876 before a Subcommittee of the Committee on Public Lands, House of Representatives, April 1948. See also H. Rept. No. 2035, 80th Cong., 2d Sess.

or contention that a law of Congress must operate with complete uniformity over the States and Territories. Again, it does *not* involve any requirement or contention that Puerto Rico must be treated in all respects as a State. Still again, it does *not* involve any derogation of the power of Congress to regulate commerce, including commerce between Puerto Rico and the States. What, then, the case *does* involve is simply whether Congress, in regulating that commerce, must desist from arbitrary discrimination against respondents and other sugar refiners of Puerto Rico and in favor of the mainland seaboard refiners.

The constitutional question has not been settled by this Court. As a matter of fact, so far as we have been able to discover, the precise issue raised in this case has never come to a judicial determination. In the court below the Secretary contended for an arbitrary and unlimited power in Congress over commerce between Puerto Rico and the States and for putting the power of Congress over commerce with "unincorporated" territories on precisely the same basis as the power of Congress over commerce with foreign countries (Secy. 2nd Br. 13, 15). He argued that Congress may impose an "absolute embargo" (Secy. 2nd Br. 12), that limitations for "the purpose of encouraging a domestic industry present no due process problem" (Secy. 2nd Br. 14). We deny the existence of any such unlimited power, and urge, to the contrary, that due process prohibits any arbitrary discrimination in the exercise of the power.

Of the cases which come closest to the matter in issue (as found by us or as urged by the Secretary) only two require present comment: *Downes* v. *Bidwell*, 182 U. S. 244, and *Hooven & Allison Company* v. *Evatt*, 324 U. S. 652. But it may be said at once that, in respect of their specific holdings, neither of them controls the question in this case. The *Downes* case involved the validity of a federal impost on goods from Puerto Rico challenged as in violation of the express requirement of uniformity

"throughout the United States" for such imposts; and the *Hooven* case involved the validity of a State *ad valorem* tax on goods from the Philippines challenged as in violation of the express prohibition against imposts by a State.

The diversity of views of the Justices (they divided 5-4 in both cases, with five opinions in the first and four in the second) attests the complexity of the problem and the lack of agreement on its constitutional solution. No opinion in the *Downes* case commanded a majority of the Court. But it is unmistakably clear that the question had to do with the geographical aspect of the provision relating to uniformity "throughout the United States". Thus, by Justice Brown in announcing the conclusion and judgment:

> "... We are now asked to hold that it [Puerto Rico] became a part of the *United States* within that provision of the Constitution which declares that 'all duties, imposts, and excises shall be uniform throughout the United States' ...
>
> "To sustain the judgment in the case under consideration it by no means becomes necessary to show that none of the articles of the Constitution apply to the Island of Porto Rico. *There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several states.*" (182 U.S. at 249 and 276, emphasis supplied.)

In the *Hooven* case, as we have said, the question concerned the applicability of a specific prohibition on the taxing power of a *State*. The Court, using the "original package" rule, invalidated a state *ad valorem* tax on hemp from the Philippines. The Court said that the articles in question were "imports" because "the place from whence they are brought is not a part of the United States in the constitutional sense to which the provisions with respect to [taxation of] imports are applicable." The majority confined the discussion to the Philippines (p. 672); they cited Congressional statutes—e.g., the Philippines Independence

Act—which have no comparable counterparts with respect to Puerto Rico; four Justices dissented from the application of the original package rule in this case; and—a most unusual occurrence—*five* Justices protested against the economic consequences of the decision.

These cases, then, are concerned with specific geographical limitations on the *taxing* power of the Nation and States. They do not preclude this Court from determining, on the merits and having regard to specific differences in applicability of various provisions of the Constitution, the extent of the *regulatory* power of Congress over commerce between Puerto Rico and the States. The question in this case is an open one.

This Court is peculiarly the forum for the settlement of the question. In the exposition of principles involved in the doctrine of judicial review in constitutional cases the Court has indicated a certain relationship between the exercise of judicial power and the operation of political processes. Thus, for example, is the suggestion, originating with Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 435, and renewed by Stone in *Helvering* v. *Gerhardt*, 304 U. S. 405, 416, that judicial intervention may not be needed to protect the States against national encroachment to shield the parts from action by the whole—and for the reason that the people of the States, acting through their representatives in the Senate and House, are in position to protect themselves. See also, *Wickard* v. *Filburn*, 317 U. S. 111, 120, per Jackson, J. But the people of Puerto Rico are outside that reasoning—they have no vote in the body which imposes the limitations upon them, e.g., the sugar quota now drawn in question. This case, then, exhibits an arbitrary discrimination against people who are denied representation; it presents an appropriate occasion for the exercise of judicial power.

C. Reasons for Denying Writ to Review the Statutory Question.

The statutory question involves only a fight among three Puerto Rican refiners (Roig, Western, and Porto Rican American) as to their respective shares of the Puerto Rican refined sugar quota. While of great importance to each of them, the question is not one of general importance nor is it one of substance relating to the construction of a statute which has not been, but should be, settled by this Court. Determination of the statutory question does not affect the consumer or the supply of sugar for the continental United States but affects only how much of a small portion (slightly over 1%) of that supply will be furnished by each of the three Puerto Rican refiners. No other Act provides for allotments on the basis of the three statutory standards of concern here.

There is no conflict among decisions of circuit courts of appeals over the proper interpretation of the standards. The United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction over appeals from allotment orders under the Act (§ 205(b)). That court's decision in the present case is consistent with its only other decision on similar points. See, *Gay Union Corporation* v. *Wallace*, 71 App. D. C. 382, 112 F. 2d 192 (1940).

On the statutory question there is no failure of the court below to give proper effect to any applicable decision of this Court.

The decision below is clearly correct on the statutory question. When the court below decided the *Gay Union Corporation* case under the 1937 Act the three statutory standards of proportionate shares, past marketings, and ability to market read in the disjunctive—"or", not the conjunctive—"and". Subsequent to the decision Congress amended section 205(a) so that in the 1948 Act the three statutory standards read in the conjunctive and the Secretary is required to take into consideration all three stan-

dards. In Order 18 the Secretary held the standard of proportionate shares inapplicable and failed to take it into consideration (R. 171). In Order 18 he actually measured ability to market by past performance (R. 173) and in his brief below stated that he had concluded that "ability to market could best be measured by actual performance (i.e., past marketings)." He did this even though past marketings are a standard separate and distinct from ability to market. The result is that despite the amendment made by Congress the Secretary has, as to four of the six allottees, actually taken into consideration and applied only one of the three standards, namely, past marketings. He has applied that standard twice, once in its own right, and once by measuring ability to market by using 1935, 1936, 1939, and 1940 past marketings. By reading out of the statute in effect the standards of proportionate shares as to six allottees and ability to market as to four allottees and using as to these four the one standard of past marketings, the Secretary treats the Act as though it had never been amended. The decision below is clearly correct in requiring the Secretary to give consideration to all three statutory standards.

Omitting proportionate shares as an applicable standard is no longer permissible in view of the amendment of the statute making the three standards now read in the conjunctive instead of the alternative. Whether or not the standard is applicable to allotment of quotas of foreign countries (cf. Secy. Pet. 18), it is clearly applicable to allotment of quotas of the five domestic sugar areas since proportionate shares are assigned to the farms in all such areas. The Secretary never has allotted the quotas of foreign areas. The court below was clearly right in requiring some weight to be given to the standard of proportionate shares in making allotments of sugar quotas for the domestic areas.

In order to restore prewar competitive relationships and preserve Porto Rican American's prewar monopoly (it had

95.7% of the refined sugar quota in 1935), the Secretary measured Porto Rican American's ability to market a 1948 allotment by its performance in 1935 (R. 173). Never since —not even in prewar years—has Porto Rican American marketed anything like the 116,611 ton figure of 1935 (R. 147). Clearly the court below was right in requiring the standard of ability to market to be measured by current performance if performance, rather than plant capacity, was to be the measuring stick.

Also to restore prewar competitive relationships and preserve Porto Rican American's prewar monopoly, the Secretary in measuring past marketings excluded marketings during 1942-1947 and used those of the allottee's five highest years during 1935-1941 (R. 172). The period used includes all of Porto Rican American's five highest years, but only two of Roig's and one of Western's (R. 147). The excuse given by the Secretary of Agriculture is that the war years were a period of abnormality (R. 169). Obviously in no one year are marketing conditions precisely the same as in any other year. Admittedly during the war years many kinds of control were imposed on all of us. Moreover, marketing conditions in the war years represent 1948 marketing conditions more nearly than do marketing conditions in the prewar years.

The evidence cited (R. 164-165) by the Secretary to the effect that Puerto Rican refiners were not equally affected by what the Secretary terms "wartime dislocations", is decidedly unconvincing. It consisted of a statement by the Government Witness that the dislocations "affected first one and then the other, either favorably or adversely dependent on the moment" and that "refiners closer to San Juan at some one time or other, may have been more favorably treated than others" as to availability of ships at a nearby port. Incidentally Western is further from San Juan than Porto Rican American; Roig nearer. The remaining evidence cited by the Government on this point is

of blackouts, gas rationing, shipping priorities, and other wartime restrictions that Porto Rican American complained of as "difficulties" and which Roig and Western surmounted (as did Porto Rican American) and so refused to call difficulties (R. 61-62, 139). Even Porto Rican American, despite its purported difficulties, was throughout the war period able to market, in the same year as produced, all its refined sugar produced for marketing in the States, save in one year when a small amount was carried over until February of the following year (R. 88-89). The question, however, is not one of evidence but of the proper interpretation of the words "past marketings". The statute does not say "marketings in a representative period to be determined by the Secretary" or "past marketings adjusted for war abnormalities."

The real difficulty with Porto Rican American's mainland marketing record during the war years was that there existed under Government controls a price differential (R. 49) in favor of marketing refined sugar in the Island as against marketing it on the mainland. Porto Rican American consequently chose to increase its local marketings at the expense of its mainland marketings (R. 12, 25, 147). It did not have raw sugar supplies sufficient to build up both mainland and local marketings (R. 85-87, 37), as did Roig and Western.

Clearly the court below was correct in holding that the statutory standard of past marketings did not permit the exclusion of marketings during the past years of 1942-1947.

The effect of the decision below is to prevent the Secretary from manipulating the statutory standards by a variety of untenable ad hoc interpretations all designed to restore and reinforce Porto Rican American's prewar monopoly of refining in Puerto Rico.

D. The Case is Not Moot.

The Solicitor General in his petition on behalf of the Secretary (p. 24) specifically takes the position that the case is not moot. Respondents agree.

Under the Act (§ 201) the Secretary cannot make his determination as to the amount of sugar needed to meet the requirements of consumers in the continental United States until December of the year preceding the allotment year. Allotments of Puerto Rico's sugar quota and of its refined sugar quota for the allotment year are not made until after that determination. Thus Order 18 for the allotment of the refined sugar quota for 1948 was made public January 22nd of last year. The corresponding order for 1949 has not yet been issued.

Marketing of refined sugar for mainland consumption in excess of the amount permitted by the allotment order is, under the Act, subject to severe penalties—three times the market value of the sugar (§ 405). To refine sugar for mainland consumption in any allotment year in amounts in excess of the allotment order for that year is not practicable. It involves relying on the contingency that such order might be set aside by a final judgment of a court prior to the end of the allotment year and the marketing of the sugar thereby permitted during the allotment year without risk of penalties. If the order is not ultimately set aside the risks of loss through penalties for marketing excess refined sugar or through storage costs and the physical deterioration if not marketed but carried over, are too great.

Finally there is little likelihood (and this case well illustrates the point) of obtaining final judgment before the close of the allotment year. The value of court review of allotment orders under the Act is not that it affords relief with respect to the order for the allotment year under review but that the decision serves as a guide to the Secretary when called upon to act again on the same matter for

a subsequent year. In such a situation a case is never moot. *Gay Union Corporation* v. *Wallace*, 71 App. D. C. 382, 112 F. 2d 192, 195, cert. den. 310 U. S. 647; *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 452; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 515; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 413-414; *Ford Motor Co.* v. *United States*, 335 U. S. 281, 313 (advance sheets).

In the hearings held by the Secretary of Agriculture in January of this year preparatory to issuance of an order allotting the Puerto Rican refined sugar quota for 1949, both Roig and Western, as well as Porto Rican American and the Government of Puerto Rico, raised the question of the constitutional validity of the hearing and other proceedings in connection therewith as well as of any order issued pursuant thereto. The constitutional question presented by Order 18 for the year 1948, if not decided in connection with the present case, would be presented to the courts in connection with the corresponding order for 1949. This affords an added reason for the determination of the question at this time.

CONCLUSION.

Wherefore, it is respectfully submitted that the petitions for writs of certiorari in Nos. 575 and 580 to review the judgment of the Court of Appeals for the District of Columbia Circuit with respect to the statutory question should

be denied, and the petition for writ of certiorari in No. 585 to review that judgment with respect to the constitutional question should be granted.

Respectfully submitted,

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Nos. 27 30 32

SUPREME COURT, U.S.

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OCTOBER TERM, 1949

Nos. [redacted]
27, 30 + 32

SECRETARY OF AGRICULTURE, *Petitioner*

v.

CENTRAL ROIG REFINING COMPANY and WESTERN SUGAR REFINING COMPANY, *Respondents*

PORTO RICAN AMERICAN SUGAR REFINERY, INC., *Intervener-Petitioner*

GOVERNMENT OF PUERTO RICO, *Intervener-Petitioner*

THE AMERICAN SUGAR REFINING COMPANY, ET AL., *Interveners-Respondents*

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN SUGAR REFINING CO., ET AL., IN OPPOSITION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 575, 580 and 585

SECRETARY OF AGRICULTURE, *Petitioner*

v.

CENTRAL ROIG REFINING COMPANY and WESTERN SUGAR REFINING COMPANY, *Respondents*

PORTO RICAN AMERICAN SUGAR REFINERY, INC., *Intervener-Petitioner*

GOVERNMENT OF PUERTO RICO, *Intervener-Petitioner*

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN SUGAR REFINING CO., ET AL., IN OPPOSITION

STATEMENT

This case involves a dispute between three Puerto Rican sugar refiners as to the relative amounts of refined sugar each should have been allowed to market in the continental United States in 1948.

The Sugar Act of 1948 establishes annual quotas which limit the quantities of sugar that various foreign and domestic producing areas may market in the continental United States in interstate or foreign commerce or commerce between the territories or possessions and the mainland. Whenever it is necessary to assure an orderly flow of sugar, to prevent disorderly marketing, or to afford an equitable opportunity to all interested parties to participate in the quotas, the Secretary of Agriculture is authorized to make allotments among sugar processors of any quota established by the Sugar Act for a particular area. The Secretary found that it was necessary for 1948 to make a proration of the Puerto Rican refined sugar quota established by § 207 of the Sugar Act, and allotted a share of this quota to each of six Puerto Rican refiners. Upon the statutory appeal of two of the three largest of those refiners, the United States Court of Appeals for the District of Columbia set aside the order of the Secretary on the ground that it failed to give proper effect to each of the three standards which § 205 of the Sugar Act provides shall be considered by the Secretary in making such allotments.

The largest of the Puerto Rican refiners, Porto Rican American, intervened below under § 205 (d) of the Act which grants a right to intervene to any "interested person," and supported the Secretary's order. It has filed a petition for a writ of certiorari to review the decision of the Court of Appeals. The Secretary of Agriculture has also petitioned for review of the decision reversing his order. Both of these petitions urge that the Court of Appeals erred in its interpretation of § 205 of the Sugar Act.

The Government of Puerto Rico, an intervener below by special order of the Court of Appeals and not pursuant to § 205 (d) of the Act, also has petitioned for a writ of certiorari. It asserts no concern with the question of statutory interpretation dealt with by the Court of Appeals. Rather, it urges this Court to take up the constitutionality of § 207 of the Sugar Act which establishes the refined

sugar quotas. The Secretary's petition states that, in the event this Court disagrees with the interpretation of the statute made by the Court of Appeals and reinstates the Secretary's order, this Court will then come to the constitutional question, but neither the Secretary's nor Porto Rican American's petition seeks review on the basis of the constitutional issue.

This brief in opposition to the granting of a writ of certiorari is submitted on behalf of ten domestic sugar refining companies who intervened below pursuant to § 205 (d) of the Sugar Act in support of the constitutionality of § 207 of that Act.

REASONS FOR DENYING THE WRIT

I

The Decision of the Court of Appeals Raises No Constitutional Question

The two Puerto Rican refiners dissatisfied with the Secretary's allotment of refined sugar to them petitioned the Court of Appeals to do one thing—to set aside the Secretary's sugar allotment order. This the Court did. At least four grounds were urged upon that Court as the basis for vacating the order. (R. 181-182). One of these was that § 207 of the Act, which limits the total amount of refined sugar that can be marketed in the continental United States from Puerto Rico and other offshore areas, is unconstitutional. The lower Court expressly declined to pass on that question, because it decided that there was full and sufficient basis for setting aside the Secretary's order—the only relief asked in the petition presented to it (R. 181)—in the Secretary's failure to give proper weight to the standards set forth in § 205 of the Act governing the allotment of quotas. In effect, the Court refused to render an advisory opinion as to whether a proper order of the Secretary, one that conformed to the statutory standards, would violate any provision of the Constitution.

The lower Court's interpretation of § 205 differed from that of the Secretary in three respects.

In determining "ability to market," one of the statutory considerations governing the allotment of quotas, the Secretary relied upon the best single year's performance for each refiner during any one of the 13 years preceding 1948. The lower Court held that "ability to market" means current ability, and, if performance is the measure of that ability, it must be current performance and could not be performance as of 13 years ago. (R. 196). In giving effect to "past marketings," another consideration prescribed by the statute, the Secretary based his findings upon marketings during the pre-war period 1935-1941. The lower Court held that, in excluding from consideration the six years, 1942-1947, and looking only to pre-war years, the Secretary had failed to comply with the Act. (R. 196). The Court did not decide that, if drought, fire, flood or other abnormalities affected the entire sugar crop or a particular refiner's marketings in a recent year, those unusual circumstances must be ignored in applying the statutory standards. No such unusual circumstances were pertinent to the order reviewed by the Court and any statement in its opinion which is characterized as foreclosing the Secretary from giving proper consideration to such circumstances is entirely dictum.

The third ground on which the lower Court reversed the Secretary's order had to do with the weight to be attached to the third consideration prescribed by the statute, the processings of sugar to which proportionate shares pertained. The difference between the Court and the Secretary in this respect is more apparent than real. The net of the decision below is that the Secretary may not conclude that this statutory standard is *inapplicable* to the allotment of a quota. Provided he considers this factor, there is nothing in the lower Court's opinion that prevents the Secretary from attaching to it only such weight as all relevant circumstances justify. (R. 196-197).

For these reasons the lower Court set aside the Secretary's order, as the appellants below had prayed. The entire matter, as it presently stands, is in a posture no different from that in which it would be if the Secretary were for the first time allotting the Puerto Rican quotas, except that he has been provided with an interpretation of the Act by the Court of Appeals.

Hence the only question presented by the decision of the Court of Appeals is the very narrow question whether it erred in its interpretation of § 205 of the Sugar Act. Its decision presents no constitutional question.

II

Reversal of the Court of Appeals and Reinstatement of the Secretary's Order Would Raise No Substantial Constitutional Question

The argument of the Government of Puerto Rico that § 207 of the Sugar Act of 1948 is unconstitutional proceeds essentially on these grounds: It admits the need for Congressional limitation upon the marketing of sugar. It describes the conditions of over-supply which made such action imperative and refers to the benefits from such legislation to all domestic sugar producing areas, including Puerto Rico. (Petition, pp. 4-5). It agrees that Congress can correct these conditions by regulating the marketing of raw sugar, and by prescribing quotas therefor, including a quota for Puerto Rico. (Petition, p. 4). It argues, however, that, in providing for quota regulation by the Secretary for *refined* sugar, as distinguished from *raw* sugar, Congress "ventured where there was no legislative need." (Petition, p. 5). In addition it claims that the provision for a refined sugar quota for Puerto Rico is so arbitrary as to offend the due process clause.

Surely, after the repeated adjudications of this Court sustaining marketing quota and similar statutes during recent years, it cannot now be thought that this Court need

be occupied once more with consideration of a question which presents nothing more than the nature and extent of a "legislative need." Long past is the day when the judiciary substituted its judgment for that of the legislature. Only recently a unanimous Court had this to say:

> "Looking through the form of this plea to its essential basis, we cannot fail to recognize it as an argument for invalidity because this Court disagrees with the desirability of the legislation. We rehearse the obvious when we say that our function is thus misconceived. We are not equipped to decide desirability; and a court cannot eliminate measures which do not happen to suit its tastes if it seeks to maintain a democratic system. The forum for the correction of ill-considered legislation is a responsive legislature." *Daniel* v. *Family Security Life Ins. Co.*, U. S. Sup. Ct., February 28, 1949, p. 5.

A. THERE IS A "LEGISLATIVE NEED" FOR REFINED SUGAR QUOTAS

In the Sugar Act of 1948 Congress continued for five years a pattern of temporary regulation of the marketing of sugar which had been adopted originally in the Jones-Costigan Act of 1934, and continued in the Sugar Act of 1937. The sugar industry was faced with disaster in 1934. There was over-expansion in the growing of sugar cane and sugar beets, and there was excess capacity in the facilities for refining. Previous governmental controls, limited to tariff walls and then to an experiment in marketing agreements, recently described as a "fiasco,"[1] had broken down completely. It was essential that a more direct form of control be introduced in order to provide the necessary stabilization. Hence in the Act of 1934 and its successor acts there was adopted the now familiar system of quotas on marketing in interstate commerce and in commerce between the offshore areas and foreign countries and the States.

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[1] Bernhardt, *The Sugar Industry and the Federal Government* 137 (1948).

This quota system works as follows:

The Secretary of Agriculture is directed to determine annually the total "amount of sugar needed to meet the requirements of consumers in the continental United States." § 201 of the Sugar Act. Then there is an apportionment, by express statutory provision, of 4,268,000 short tons among the five sugar producing areas of the United States: the beet area, the mainland cane area, and the cane areas of Hawaii, Puerto Rico and the Virgin Islands. Of this total amount the beet area receives nearly two million tons, Hawaii receives just over a million tons, Puerto Rico just under that figure, and the mainland cane area a half million tons. § 202 (a). In addition to the 4,268,000 tons, the statute assigns close to a million tons to the Republic of the Philippines. § 202 (b). Any remainder of the annual continental sugar requirement is assigned to foreign countries, other than the Philippines, with practically all of it to Cuba. § 202 (c). Provision is made for the reallocation of deficits when the Secretary finds that any of the above areas will be unable to supply its quota. § 204. Also, from time to time during the course of the calendar year, the Secretary may change the consumption requirements previously determined by him under § 201.

These statutory quotas do not distinguish between raw and refined sugar. If the Act had stopped with the establishment of such quotas—as the Government of Puerto Rico urges—grave injury and dislocation would have been visited upon the continental cane sugar refining industry. The continental cane refineries have an annual capacity of 7,000,000 tons.[1] In adopting a general marketing quota system, Congress was drastically limiting the supply of raw sugar available to these refineries. The beet area quota was not available to cane refineries; beets are made into sugar for the consumer in one continuous process by fac-

[1] *Hearings before the House Committee on Agriculture on the Sugar Act of 1948*, 80th Cong., 1st Sess. 87 (1947).

tories in the beet area. Therefore, if the sugar quotas for the offshore areas and foreign countries were filled with refined sugar, the mainland refineries would be limited to the mere half million tons allotted by the statute to the mainland cane area, for the Act foreclosed any other source of raw sugar supply. This, of course, would have meant utter ruin for the mainland refining industry.

Here, then, was a "legislative need" which led the Congress to incorporate in the general quota system a provision for refined cane sugar quotas. This consists of a limitation, prescribed in the statute, upon the portion of the quota of Hawaii, Puerto Rico, the Virgin Islands, the Philippines, and Cuba which may be filled each year by refined sugar. § 207 (a)-(e).

The practical operation of this system can be illustrated by experience in 1948. The Secretary finally fixed 7,200,000 tons as the mainland consumption requirement, under § 201 of the Act. Of this amount, 4,268,000 tons were initially allocated under the Act as shown above. However, on account of deficits that later developed in several producing areas, the Secretary adjusted the original quotas. The table below shows (1) this adjusted final quota for each area for marketing on the mainland, (2) the portion of such quota marketed in refined form, and (3) the differ-

ence between the two, or the quota available for the mainland cane refineries.[1]

Area	Final total quota	Portion marketed on mainland in refined form	Quantity available to mainland cane refineries
	(In 1,000 short tons, raw value)		
Domestic beet sugar	1,688	1,688	0
Mainland cane sugar	413	97	316
Hawaii	825	5	820
Puerto Rico	1,024	123	901
Virgin Islands	6	0	6
Philippines, Cuba and other foreign countries	3,244	385	2,859
Total	7,200	2,298	4,902

This table makes apparent the "legislative need" for refined sugar quotas. Had Puerto Rico, for example, been permitted to market its entire quota on the mainland in refined form, the raw sugar supply available to the mainland refineries would have been reduced by about 900,000 tons. And the Act would prevent the mainland refineries from making up this deficit elsewhere.

It cannot be seriously suggested that Congress "ventured where there was no legislative need" in thus stabilizing the supply of raw sugar for cane refineries. Actually the Government of Puerto Rico does not particularly urge that there was no need for legislation; the burden of its argument is that Congress should have met this need in some other manner.

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[1] The final quota for the various areas which appears in the first column of figures is published in 13 FED. REG. 7633 (1948). The quantity of refined sugar marketed from each area is reported in Production and Marketing Administration, U. S. Department of Agriculture Release 207-49, Jan. 31, 1949, and U. S. Department of Agriculture Release 296-49, Feb. 11, 1949.

B. THE PROVISION FOR REFINED SUGAR QUOTAS DOES NOT TREAT PUERTO RICO ARBITRARILY

Once the "legislative need" is recognized, it becomes apparent that there is no arbitrary treatment of Puerto Rico in the constitutional sense. The amount of Puerto Rico's refined quota, for shipment to the States, represents the largest amount that had ever been shipped from Puerto Rico at any time prior to the institution of the original quota system in 1934.[1]

Congress might have prescribed a larger amount for Puerto Rico, with a resulting lower amount for refining in the States. Or it might have prescribed a larger amount for Puerto Rico and a correspondingly smaller amount for Cuba. Or it might have cut down on the total beet quota, with a corresponding increase in the refined sugar quota for Puerto Rico. Doubtless there are many other possibilities. And when the present Sugar Act expires—it is a temporary measure—Congress may decide to adopt one of these alternatives if a new Act is adopted. But each of these several possibilities presents its own special problems, and our Constitution leaves to Congress the task of weighing the merits of the alternatives.

> "It is of the essence of the plenary power conferred that Congress may exercise its discretion in the use of the power. Congress may choose the commodities and places to which its regulation shall apply. Congress may consider and weigh relative situations and needs. Congress is not restricted by any technical

[1] Representative Jones of Texas, Chairman of the House Committee on Agriculture, in discussing the bill which became the Sugar Act of 1937, said on the floor of the House of Representatives (81 CONG. REC. 8432 (1937)):

> "These provisions in the bill [the provisions prescribing the refined sugar quotas for territories, including the quota of 126,033 tons for Puerto Rico] would permit the largest amount of direct-consumption sugar or refined sugar to come in from those islands which they ever sent in in any one year prior to the enactment of the original act."

requirement but may make limited applications and resort to tests so that it may have the benefit of experience in deciding upon the continuance or extension of a policy which under the Constitution it is free to adopt. As to such choices, the question is one of wisdom and not of power." *Currin* v. *Wallace*, 306 U. S. 1, 14 (1939).

Thus, entirely aside from the questions as to the constitutional relationship of an unincorporated territory like Puerto Rico to the rest of the United States which the Government of Puerto Rico seeks to inject, what Congress has done in this Act merely represents the balancing of legislative needs and alternatives—and that balancing cannot be done in the courts.

It need hardly be added that the Sugar Act presents no precedent for the arbitrary limitation of shipment of Puerto Rican manufactures to the mainland, as the Government of Puerto Rico seems to argue. (Petition, pp. 20-21). The Act is a complicated measure tailored to the peculiar requirements of sugar growers and processors throughout the United States, including Puerto Rico. It has nothing to do with the very different conditions affecting the cement, or furniture or glass container industry. The Act provides for huge cash benefit payments to growers which in Puerto Rico alone, amounted to about $130,000,000 between 1934 and 1946,[1] to say nothing of the millions of dollars in price premiums[2] paid and being paid by mainland consumers to the Puerto Rican sugar industry. Benefit and restriction must go together for the three refiners in Puerto Rico just as for the rest of the sugar

[1] Benefit payments for each year except 1935 are published in AGRICULTURAL STATISTICS (1947) 625 (Table 726); payments in 1935 are published in SEN. DOC. No. 274, 74th Cong., 2nd Sess. 101 (Table 38) (1936).

[2] The premium over the world market price results, of course, from the Sugar Act's quota restrictions upon sugar production and imports.

industry of the United States. The Constitution does not require that the one be given free of the other.

III

It Would Not Be Appropriate to Consider the Constitutionality of the Sugar Act on This Record

A. This record is utterly barren of any factual basis for assessing the reasonableness of the exercise of the judgment of Congress, even if such a question were open. The record contains only reports and testimony which were submitted to assist the Secretary of Agriculture in the exercise of his statutory duty to allocate among the Puerto Rican refiners the refined sugar quota assigned by the Act to Puerto Rico. There is not a single item of evidence showing or purporting to show that the quota established by the Act is itself unreasonable. In the absence of such evidence, this Court has refused to pass upon the constitutionality of similar economic regulation, even when the question was directly presented. *Borden's Co.* v. *Baldwin*, 293 U. S. 194 (1934). There, in refusing to speculate as to whether a marketing and quota system of regulation for milk was arbitrary and unreasonable, the Court said:

> "But where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings. With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commerical or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support." 293 U. S. 194, 210.

B. The Court of Appeals properly declined to explore the constitutional question urged by the Government of Puerto Rico. Thus this Court is not benefited by a treatment of that question in a lower court opinion.[1] Nor are there any opinions of other Circuit Courts of Appeals dealing with the question. Indeed, this Act and its predecessors have been singularly free of review in the courts upon any issues, statutory or otherwise.[2] Thus there is here neither conflict nor a "much litigated question." *Cf. Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 609 (1944).

C. There is an abundance of opportunity to the Government of Puerto Rico and to refiners in Puerto Rico to present the constitutional question in other proceedings, if they wish, and upon a full record devoted to developing the facts relevant to a review of alleged arbitrary action by Congress. The petition of the Government of Puerto Rico not only admits this, but elaborates at some length upon the other opportunities available. (Petition, p. 17). "There are, apart from intervention in a private suit, a number of other ways in which the petitioner might raise anew the question which it is now presenting to this Court." (*Idem.*)

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[1] In Blair v. Oesterlein Co., 275 U. S. 220, 225 (1927), this Court said:

> "This Court sits as a court of review. It is only in exceptional cases, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here. *Duignan* v. *United States*, 274 U. S. 195. There are specially cogent reasons why this rule should be adhered to when the question involves a practice of one of the great departments of the government."

[2] Since the original Sugar Act of 1934 only five cases involving any phase of it and succeeding Sugar Acts have been before the federal courts. Vives, et al. v. Serralles, 145 F. 2d 552, 555 (C. C. A. 1st 1944); Spreckels Sugar Co. v. Wickard, 131 F. 2d 12 (App. D. C. 1941); Gay Union Corporation v. Wallace, 112 F. 2d 192 (App. D. C. 1940), *cert. denied* 310 U. S. 647 (1940); Fajardo Sugar Growers Association v. United States, 76 F. Supp. 377 (S.D. N.Y. 1948); Ewa Plantation Company v. Wallace, 1 S. C. C. C. (N.S.) 208 (1934).

IV

The Government of Puerto Rico Asserts No Justiciable Interest

As we stated at the outset, *supra*, page 3, the Government of Puerto Rico's petition is the only one of the three that have been filed which presents the constitutional question as the basis for granting the writ. Apart from all the other reasons for denying its petition, it lacks both standing to sue and a justiciable interest in this question.

The only interest asserted by the Government of Puerto Rico is its interest as a sovereign or *parens patriae*. (Petition, p. 9). It expressly admits that it asserts no proprietary interest.

But the Government of Puerto Rico is a mere municipal creature of Congress; it is neither sovereign nor *parens patriae*. Puerto Rico is not even an incorporated Territory. *Balzac* v. *Porto Rico*, 258 U. S. 298, 305 (1922). It has no independent sovereignty, like a State. *Domenech, Treasurer of Puerto Rico* v. *National City Bank of New York*, 294 U. S. 199, 204 (1935). It is the United States, not the Government of Puerto Rico, which is the *parens patriae* with respect to the people of that island. *Mormon Church* v. *United States*, 136 U. S. 1, 47, 56-57, 62, 66 (1890). That Government is but an instrumentality of the Congress, *Talbott* v. *Silver Bow County*, 139 U. S. 438, 446 (1891), and as such cannot be heard to challenge the validity of an Act of the Congress.

Even if the Government of Puerto Rico had the status of a sovereign state, its standing to raise this question would not be improved. A State may not, on behalf of its citizens, challenge the validity of an Act of Congress, either in the lower federal courts or pursuant to the original jurisdiction of this Court. *Jones, Governor ex rel. State of Louisiana* v. *Bowles*, 322 U. S. 707 (1944); *Florida* v. *Mellon*, 273 U. S. 12 (1927); *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923). Nor is the force of this longstanding rule in

any way impaired by this Court's decision in *Georgia* v. *Pennsylvania Railroad Company*, 324 U. S. 439 (1945), where the Court expressly re-affirmed the lack of standing of a State to challenge an Act of Congress, saying:

> "This is not a suit like those in *Massachusetts* v. *Mellon*, and *Florida* v. *Mellon*, *supra*, where a State sought to protect her citizens from the operation of a federal statute. Here Georgia asserts rights based on the anti-trust laws." 324 U. S. 439, 446-447.

The Government of Puerto Rico did not intervene below as an "interested person" under that provision of the Sugar Act authorizing such intervention. § 205 (d). Rather it intervened by special permission of the Court of Appeals under its rules. The Act authorizes a petition in this Court for writ of certiorari only by an "interested party" in the statutory sense. § 205 (e). In any event, the Constitution permits this Court to hear only those with a justiciable interest.

Respectfully submitted,

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March 31, 1949

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FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 27

SECRETARY OF AGRICULTURE, *Petitioner*,

v.

CENTRAL ROIG REFINING COMPANY, ET AL., *Respondents*.

No. 30

PUERTO RICAN AMERICAN SUGAR REFINERY, INC., *Petitioner*,

v.

CENTRAL ROIG REFINING COMPANY, ET AL., *Respondents*.

No. 32

THE GOVERNMENT OF PUERTO RICO, *Petitioner*,

v.

THE SECRETARY OF AGRICULTURE, ET AL., *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM OF THE GOVERNMENT OF PUERTO RICO IN REPLY TO BRIEF OF THE AMERICAN SUGAR REFINING COMPANY, ET AL. IN OPPOSITION TO GRANT OF WRIT.

For the Government of Puerto Rico,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 575.

SECRETARY OF AGRICULTURE, *Petitioner*,

v.

CENTRAL ROIG REFINING COMPANY, ET AL., *Respondents*.

No. 580.

PORTO RICAN AMERICAN SUGAR REFINERY, INC., *Petitioner*,

v.

CENTRAL ROIG REFINING COMPANY, ET AL., *Respondents*.

No. 585.

THE GOVERNMENT OF PUERTO RICO, *Petitioner*,

v.

THE SECRETARY OF AGRICULTURE, ET AL., *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM BY THE GOVERNMENT OF PUERTO RICO IN REPLY TO BRIEF OF THE AMERICAN SUGAR REFINING COMPANY, ET AL., IN OPPOSITION TO GRANT OF WRIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The function, we take it, in the exchange of briefs in respect to the petition for a writ of certiorari is sharply to state issues, not to argue or to resolve them. In this instance your petitioner, the Government of Puerto Rico, asks for a writ from this Court to review the judgment of the

court below in the case styled *Central Roig Refining Company, et al. v. Secretary of Agriculture*, 171 F. (2d) 1016, limited to the constitutional question. Among the parties below Central Roig and Western support the petition of the Government of Puerto Rico; the Solicitor General has waived his right to answer; the Porto Rican American company takes a position of neutrality; and the Mainland Refiners alone oppose. In general, the American Sugar Refining Company, et al., take positions opposed to those of the Government of Puerto Rico. In doing so their brief helps to clarify differences and, thereby, becomes a source of argument for the granting of the writ. For that reason it is here necessary to do no more than point out that the constitutional issue needs no further processing by the court below; to indicate the sharp differences between your petitioner and the Mainland Refiners on the relevant points of law; and to challenge the degradation of the Government of Puerto Rico to a mere municipality stripped of all power lawfully to protect its own interests and those of its people.

ARGUMENT

1. The Constitutional Issue, Without Further Processing by the Court Below, is Ready for Presentation to this Court.

The Mainland Refiners argue (Br. p. 12) that there is no record built up below on the basis of which this Court can entertain the constitutional question. They insist that a judgment upon the validity of the accused section (Sugar Act of 1948, Section 207(b)) "shall not be reached without adequate factual support." With this principle there can be no disagreement; its requirements are fully satisfied here. The Central Roig and the Western Sugar Refining Company raised this question in the proceeding before the Secretary of Agriculture (R. p. 182). It was the major one of the two questions raised by Central Roig and Western in their petition to the Court of Appeals to renew Sugar Order

No. 18 (R. p. 160). The Mainland Refiners, who professed themselves as without interest in the allocations intervened in the court below solely in respect to the constitutional question (R. 188). The statute speaks for itself; the legislative history is recited in the Congressional debates, of which this Court can take judicial notice, and from which the Mainland Refiners have quoted at length (Br. in U. S. Ct. of Appeals, pp. 6, 7, 13, 16). The facts which attend the operation of the accused section admit of no dispute. The court below found no deficit in "adequate factual support"; nor was this argument which the Mainland Refiners now make urged upon it. On the contrary, as the opinion below states, "All agree that this question has been fully argued" (171 F. (2d) 1016, 1019). The only shortcoming thus far has been the failure of the court below to decide the constitutional issue. And this is the deficit which prompts the petition for the writ. As pointed out in our Petition (p. 16) this failure in no wise adds to the difficulties of this Court in resolving the constitutional issues presented.

2. In Respect to the Constitutional Question, the Government of Puerto Rico Joins Issues Sharply With the Mainland Refiners.

It is neither possible nor necessary to pass in review the whole of the Mainland Refiners' objections. We are persuaded, as we hope fully to demonstrate if the writ asked for is granted, that their contentions are largely specious and their argument beset with infirmities. For this occasion, it is, however, enough to point out, in terms of a few examples, that the propositions put forward by them are subject to serious challenge.

This case involves more than "a dispute between the Puerto Rico sugar refiners" (Br. p. 1); it concerns—and from the first has concerned—an arbitrary limitation upon the insular refining industry. It has involved "a statutory appeal" to the courts (Br. p. 2); but it has also involved not as a derivation, but as a principal question, a constitu-

tional question. It speaks as if the Government of Puerto Rico for the first time insinuates a constitutional question into a case solely concerned with the application of a statute (Br. p. 3). The truth is that from the time the petition for review was first taken to the court below, the dominant question and the principal relief asked for has been a declaration of the invalidity of the accused section. They correctly state that "Central Roig and Western" petitioned the Court of Appeals "to do one thing—to set aside the Secretary's . . . order" (Br. p. 3), but they neglect to state that Central Roig and Western asked that this be done by denying the power of the Secretary to issue any order at all. And to call our petition a demand for "an advisory opinion" (Br. p. 3), when Section 207(b) was being enforced to the great and irreparable injury of the Government, the refiners, and the people of Puerto Rico, is grossly to confuse forms of action. It is only by willing the major and disturbing question out of the case that the Mainland Refiners discover that "the only question presented by the decision of the Court of Appeals is the narrow question" whether it erred in its interpretation of the standards presented by the Congress as a guide to allotment.

Nonetheless, the Mainland Refiners undertake to justify the accused section and in doing so they play fast with the facts and loose with legislative language. We insist—and if the writ is granted propose to demonstrate—that the accused section is grafted upon the measure for farm relief known as the Sugar Act of 1948. The Mainland Refiners attempt to make it an integral part of that Act (Br. pp. 6-9). To this end, and in spite of the plain language of Section 207, they insist upon converting limitations upon the marketing of refined sugar, imposed only upon off-shore territories into a quota system for refined. In doing so they ignore the double fact that 126,033 tons represent the limit within which Puerto Rico refiners can compete for the continental market, while mainland refiners are free to compete for the business of refining all sugar to be marketed on the continent, including the "portions" which off-shore

territories may have—if they succeed in getting it in competition with the Mainland Refiners (Br. pp. 7-8). It is this confusion of limitation with quota that makes invalid the table of restricted opportunity (Br. p. 9). The figures in the last column do not represent "quantity available" to Mainland Refiners, but only quantity now secured to them by Section 207 without having to compete for it. And the low figure in which they picture their plight if legal protection is withdrawn represents, not the raw sugar to which they have access, but the amount which is theirs without having to strive for it. The total quantity available is the whole supply which may be marketed within the continental United States. And if they refine no beet sugar, it is not because the law forbids, but because the beet growers have devised a more efficient technique. They may refine all the sugar marketed on the continent so far as the law is concerned.

The Mainland Refiners allege, but are at quite a loss to justify, the restrictions as in the public interest. The rationale of crop control, which justified the regulation of raw sugar, has no validity as applied to refined. They argue that the privilege accorded them is compensation for the loss of the world market on which supply they were free to draw before the first, or Jones-Costigan, sugar act was passed. (Br. pp. 7-8). It is hard to discover "compensation for what"; for they are still free to compete for all the business of refining sugar marketed within the continental United States; and for sale in foreign markets they still have access to the world supply. Besides, Puerto Rico, without compensation and to its own detriment, has been cut off from the same source of supply. The "legislative need" (Br. p. 8) amounts to no more than the right to be vested with the business without having to contend for it. Puerto Rico asks for no such proscriptive right; it demands only a chance to compete. If the result is "grave injury and dislocation" (Br. p. 7), that is the appointed way of free enterprise.

The Mainland Refiners take similar liberties with political questions. It is hardly relevant to speak of the power of the Congress over the territories—at least over the offshore territories—as plenary (Br. p. 14), when the accused section is a regulation, valid or invalid, of the continental market. It is admitted that the status of Puerto Rico is a dominant factor in this case; in fact the determination of that status is a principal reason for filing this petition. But so important and intricate a question is not to be resolved by the magic of the words incorporated and unincorporated (Br. pp. 10, 11). In the "balancing of legislative needs" (Br. p. 14), the Mainland Refiners get all the benefits while the insular refiners suffer all the disabilities. To insist that in the exercise of a disputed power Puerto Rico has been treated fairly (Br. p. 10), is hardly in point where the issue is the power of the Congress to act at all. Nor is it a perfect example of the "resort to tests" and of the experimental process (Br. pp. 10-11) to freeze the Puerto Rican industry at a figure it attained in its infancy. The contention that, even if the Congress can restrict or even prohibit the insular refining of sugar, it does not follow that the Congress can halt the processing or manufacture of other commodities in Puerto Rico, because sugar is a peculiar case (Br. p. 11) is without merit. For the question is of power; and, if continental producers of other products are threatened with serious insular competition, they may, using sugar as a precedent, insist that legislation be made to protect them against "grave injury and dislocation". And, even more important, it is a little unkind to call the issue a "political question" and to bid Puerto Rico to settle the question in the political forum, when Puerto Rico has no vote in either house of the Congress and no access to the political process.

It is easy enough to continue this dissection of the argument of the Mainland Refiners. But this is not the occasion for demonstrating to this Court that their positions are untenable and that our arguments are sound. It is enough

that this recitation shows that the constitutional issue abounds in open questions.

3. The Contentions that the Government of Puerto Rico Has No Standing to Sue and No Justiciable Interest in this Cause Are Without Merit.

We take it that the issues of Puerto Rico's standing to sue and its justiciable interest in this cause of action are not now before this Court. In the court below the Mainland Refiners, alone among the parties to this case, challenged intervention by petitioner. The matter was thoroughly explored in briefs submitted by the adverse parties. The applicable principles of law were there presented; the authorities were expounded; the relevant cases—and a host of irrelevant ones—were cited by the Mainland Refiners and dissected by your petitioner. On that occasion the Mainland Refiners put before the court in a more elaborate form the contentions presented here (Br. pp. 14-15). The Court of Appeals rejected all of these contentions, and on June 6, 1948, issued an order granting the petition of the Government of Puerto Rico to intervene in this case. The Mainland Refiners are on unsound ground in making this contention; for they make this case a "dispute between three Puerto Rican sugar refiners" over the shares within the limits of 126,033 tons allowable to them under the statute (Section 205(a)); yet they were not parties to the administrative proceeding below, have disavowed all interest in the "narrow" or statutory question; and, like the Government of Puerto Rico, became a party to the cause only because of an interest in the constitutional issue. In any event, the order of the court below makes the Government of Puerto Rico a party with the rights of any and all other parties in interest. And the Mainland Refiners have taken, and here are taking, no appeal from that order. Even if it were subject to appeal, the petition for a writ of certiorari does not present the proper occasion whereon to challenge it.

It is more to the point that in the instant case, the raising of the constitutional issue is in no wise contingent upon the standing to sue of the Government of Puerto Rico or upon its justiciable interest. That issue was in the case while the Secretary was concerned with his order. It was in the case before—in fact its presence was the occasion for—the intervention of the Government of Puerto Rico. The issue was raised by Central Roig and Western who are—and, if the Government of Puerto Rico were not a party, would still be—pressing it here. In strict terms the Government of Puerto Rico has entered this case only to call the attention of the courts to its distinctive and vital interest in a cause of action initiated by others which would, with identical issues, go forward even if it were not a party.

CONCLUSION.

The Government of Puerto Rico renews its challenge to the accused section (Sugar Act, Section 207(b)), as not authorized by the Constitution, and as being contrary to the spirit and to a number of specific provisions of that document. It asks for a writ of certiorari to the end that, after full hearing and careful inquiry, this Court may resolve the constitutional question here presented or in the alternative remand it to the court below with a mandate to decide it.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER-TERM, 1949.

No. 27. 27

SECRETARY OF AGRICULTURE, *Petitioner*,

v.

CENTRAL ROIG REFINING COMPANY and WESTERN SUGAR REFINING COMPANY, *Respondents*; PORTO RICAN AMERICAN SUGAR REFINERY, INC., *Intervenor*; THE AMERICAN SUGAR REFINING COMPANY, ET AL., *Intervenors*; and THE GOVERNMENT OF PUERTO RICO, *Intervenor*.

No. 30. 30

PORTO RICAN AMERICAN SUGAR REFINERY INC., *Petitioner*,

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CENTRAL ROIG REFINING COMPANY and WESTERN SUGAR REFINING COMPANY, *Respondents*.

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THE GOVERNMENT OF PUERTO RICO, *Petitioner*,

v.

THE SECRETARY OF AGRICULTURE, PORTO RICAN AMERICAN SUGAR REFINERY, INC., THE AMERICAN SUGAR REFINING COMPANY, ET AL., CENTRAL ROIG REFINING COMPANY, and WESTERN SUGAR REFINING COMPANY, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR RESPONDENTS, CENTRAL ROIG REFINING COMPANY AND WESTERN SUGAR REFINING COMPANY.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 27.

SECRETARY OF AGRICULTURE, *Petitioner*,

v.

CENTRAL ROIG REFINING COMPANY and WESTERN SUGAR REFINING COMPANY, *Respondents*; PORTO RICAN AMERICAN SUGAR REFINERY, INC., *Intervenor*; THE AMERICAN SUGAR REFINING COMPANY, ET AL., *Intervenors*; and THE GOVERNMENT OF PUERTO RICO, *Intervenor*.

No. 30.

PORTO RICAN AMERICAN SUGAR REFINERY INC., *Petitioner*,

v.

CENTRAL ROIG REFINING COMPANY and WESTERN SUGAR REFINING COMPANY, *Respondents*.

No. 32.

THE GOVERNMENT OF PUERTO RICO, *Petitioner*,

v.

THE SECRETARY OF AGRICULTURE, PORTO RICAN AMERICAN SUGAR REFINERY, INC., THE AMERICAN SUGAR REFINING COMPANY, ET AL., CENTRAL ROIG REFINING COMPANY and WESTERN SUGAR REFINING COMPANY, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR RESPONDENTS, CENTRAL ROIG REFINING COMPANY AND WESTERN SUGAR REFINING COMPANY.

OPINION BELOW.

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 194-197) is reported in 171 F. 2d 1016.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on November 24, 1948 (R. 198). Petitions for writs of certiorari were filed on February 18, 1949, and February 21, 1949, and were granted on April 25, 1949. The jurisdiction of this Court is invoked under United States Code, title 28, § 1254, and under § 205(e) of the Sugar Act of 1948.[1]

QUESTIONS PRESENTED.

This case involves the validity of Puerto Rico Sugar Order 18 issued by the Secretary of Agriculture January 21, 1948 (R. 160-175). By that Order the Secretary allotted for the year 1948 the Puerto Rican refined sugar limitation fixed by § 207(b) of the Sugar Act of 1948. The questions presented are—

1. Whether § 207(b) of the Sugar Act of 1948 violates the due process clause of the Fifth Amendment in that the refined sugar limitation fixed by the section arbitrarily discriminates against the sugar refiners of Puerto Rico in favor of the mainland cane sugar refiners.

2. Whether Order 18 is invalid in that it allots the refined sugar limitation contrary to the requirements of § 205(a) of the Sugar Act of 1948.

STATEMENT OF THE CASE.

The Puerto Rican Mainland Sugar Quota.—Under § 201 of the Sugar Act of 1948 the Secretary of Agriculture determined that 7,200,000 tons[2] of sugar were needed to

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[1] 61 Stat. 922-934; U. S. C. (1946 ed., Supp. II), title 7, §§ 1101-1160. Text of pertinent provisions of the Sugar Act of 1948 is set forth in Appendix C to the brief of the Government of Puerto Rico.

[2] "Tons", as used herein, means short tons, raw value, as defined in § 101 (h) of the Act.

meet the 1948 requirements of consumers in the continental United States.[1] § 202 of the Act directs the Secretary to establish for domestic sugar producing areas and foreign countries quotas (aggregating the amount so determined) for sugar that may be brought into the continental United States from those areas and countries. The five domestic sugar producing areas (frequently referred to as "U. S. flag areas") are as follows: (1) the domestic beet sugar area (Ohio, Michigan, Nebraska, Montana, Idaho, Wyoming, Colorado, Utah, California, and other States); (2) the mainland cane sugar area (Louisiana and Florida); (3) Hawaii; (4) Puerto Rico; and (5) the Virgin Islands. For each of the five domestic sugar producing areas the respective quota is composed of a flat amount specified in § 202(a) of the Act, plus certain deficit amounts (Act, § 204) arising from the inability of any other domestic sugar producing area to market its quota, as determined by the Secretary. The quota for Puerto Rico is referred to herein as the "Puerto Rican mainland sugar quota." The Secretary's determination of the amount of the Puerto Rican mainland sugar quota for 1948 was 1,023,756 tons.[2] This constituted the total amount of sugar that Puerto Rico might bring into the continental United States in 1948 in any form—raw or refined.

The Puerto Rican Refined Sugar Limitation—§ 207(b) of the Act imposes a flat limitation of 126,033 tons on the amount of the Puerto Rican mainland sugar quota that may be brought into the continental United States

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[1] 13 F. R. 4473, Aug. 4, 1948. Earlier the Secretary had determined the amount for 1948 at 7,800,000 tons (13 F. R. 131-133, Jan. 9, 1948); 7,500,000 tons (13 F. R. 1145-1146, Mar. 3, 1948); and 7,000,000 tons (13 F. R. 2948-2949, June 2, 1948).

[2] 13 F. R. 7631-7633, Dec. 9, 1948. Earlier the Secretary determined the amount for 1948 as 934,134 tons (13 F. R. 133, Jan. 9, 1948); 982,436 tons (13 F. R. 4660-4661, Aug. 12, 1948); and 1,008,261 tons (13 F. R. 6043-6045, Oct. 15, 1948).

in the form of *refined*[1] sugar. This limitation is referred to herein as the "Puerto Rican *refined* sugar limitation", as distinguished from the "Puerto Rican mainland sugar quota." The 126,033 tons were approximately 12% of Puerto Rico's mainland sugar quota of 1,023,756 tons for 1948. As to that 12% Puerto Rican refiners must compete with the mainland cane sugar refiners in the purchase of the raw sugar for refining.

In consequence of the Puerto Rican refined sugar limitation the mainland cane sugar refiners have a monopoly of the refining of the remaining 897,723 tons, or approximately 88%, of the Puerto Rican mainland sugar quota. Puerto Rico is forced to ship this quota sugar to the mainland refiners for refining by them and Puerto Rican refiners are prohibited from competing with the mainland refiners for the marketing of it in refined form (Act, §§ 209 and 405). This deprives the Island of the opportunity to obtain annually an additional income of around $19,000,000.[2] The deprivation creates a corresponding gain in the income of mainland cane sugar refiners, including the ten intervening mainland refiners.

Allotment of the Refined Sugar Limitation.—§ 205(a) of the Act provides for the Secretary's allotting the amount of the Puerto Rican refined sugar limitation whenever he makes certain findings as to the necessity for allotment.

[1] The Act actually reads "direct consumption sugar", which is not necessarily refined sugar but in fact is composed almost entirely of refined sugar. Direct consumption sugar is sugar that is not to be further refined or otherwise improved in quality before consumption (Act, § 101 (e)) and is of three kinds—refined sugar, turbinado (semi-refined), and direct consumption raw sugar (i.e., sugar used for industrial purposes without further refining or improvement of quality, as in the manufacture of tobacco). In 1948 refined sugar accounted for about 97.4% of the direct consumption sugar brought into the States from Puerto Rico (on the basis of the Secretary's figures shown in 14 F. R. 1569, Apr. 5, 1949).

[2] Hearings on H. R. 5876 before a Subcommittee of the Committee on Public Lands, House of Representatives, April 1948. See also, H. Rept. No. 2035, 80th Cong., 2d Sess., pp. 2-3.

The Secretary made the requisite findings (R. 145) and thereupon gave notice of a hearing on proposed allotments of the 126,033 tons (R. 145-148). On December 18, 1947, the hearing was held by a Presiding Officer designated for the purpose. No recommended decision was made by the Presiding Officer nor was any tentative decision issued by the Secretary, or opportunity afforded for exceptions. On January 16, 1948, Order 18 was issued by the Secretary (R. 175) and on January 22, 1948, published in the Federal Register (13 F. R. 310-313) and made effective immediately (R. 160-161).

On February 5, 1948, Central Roig Refining Company and Western Sugar Refining Company, two of the allottees (hereinafter referred to as "Roig" and "Western", respectively), filed with the Secretary their Petition for Stay and Reconsideration of Order in which they requested an opportunity to argue orally or by brief all questions of law relating to the validity of the Order (R. 176-178), including the constitutional and statutory questions here presented. This Petition was denied by the Secretary on February 11, 1948 (R. 178-179) and on the same day Roig and Western filed with the court below their Notice of Appeal and Petition for Review. Roig and Western raised therein two questions: First, a constitutional issue, namely, that the Puerto Rican refined sugar limitation is constitutionally invalid and the Order, being based thereon, was consequently invalid; and, second, a statutory issue, namely, that the Order did not conform to the statutory standards for allotments set forth in § 205(a) of the Act.

Subsequent to the appeal the following intervened:

(1) Porto Rican American Sugar Refinery, Inc., a Puerto Rican refiner and the largest allottee under the Order. Porto Rican American urged the statutory validity of the Order but took no position on the constitutional issue.

(2) Ten mainland cane sugar refiners, The American Sugar Refining Company, Godchaux Sugars, Inc., Henderson Sugar Refinery, Inc., Imperial Sugar Company, Inland Sugar Company, The National Sugar Refining Company, Refined Syrups and Sugars, Inc., Revere Sugar Refinery, Savannah Sugar Refining Corporation, and Western Sugar Refinery[1] which is the cane sugar refining department of J. D. and A. B. Spreckels Company. The mainland refiners urged the constitutional validity of the Order but took no position on the statutory issue.

(3) The Government of Puerto Rico. It urged the constitutional invalidity of the Order but took no position on the statutory issue.

Thus the Secretary and the ten mainland cane sugar refiners opposed Roig, Western, and the Government of Puerto Rico on the constitutional issue, and the Secretary and Porto Rican American opposed Roig and Western on the statutory issue.

Order 18 (after deducting an unallotted reserve of 5,169 tons, subsequently reduced to 1,000 tons, for marketing of

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[1] Not to be confused with Western Sugar Refining Company, a Puerto Rican refiner and one of the two appellants below and respondents here.

raw sugar for direct consumption) made refined sugar allotments for 1948 to six companies[1] as follows (R. 175):

Allottee	Tons Allotted Originally 1/18/48	Tons Allotted Revised[5] 10/23/48
Porto Rican American Sugar Refinery, Inc.	79,258	87,092
Central Aguirre Sugar Co., a trust	5,291	2,428
Central Roig Refining Co.	16,698	18,348
Central Guanica[2]	3,160	0
Western Sugar Refining Co.[3]	14,772	16,232
Central San Francisco[4]	1,685	933
Total	120,864	125,033

[1] The Government's proposal as set for hearing provided for an allotment to Central Camuy. However, no allotment was made for it was found that the company was no longer engaged in the manufacture of refined sugar and would not market such sugar in the continental United States in 1948 (R. 121, 174).

[2] The correct name is South Porto Rico Sugar Co. (14 F. R. 1570).

[3] Erroneously referred to as Central Igualdad in the Government's proposal as set for hearing. Central Igualdad is the raw sugar affiliate of Western.

[4] The correct name is Estate of Artúro Lluberas y Sobrinos (14 F. R. 1570).

[5] Order 18 originally issued in January was revised in October to reallot deficits of the three smaller allottees who had notified the Secretary that they would be unable to fill their allotments (13 F. R. 6232-6233, Oct. 23, 1948).

Of the six allottees only Porto Rican American, Roig and Western are primarily refiners and wholly dependent on refining. As refiners they compete with the large mainland cane sugar refiners on the eastern seaboard. Porto Rican American, Roig, and Western are all parties to this proceeding.

The other three allottees, Aguirre, Guanica, and San Francisco, are primarily producers of raw sugar, not refiners, and as such are not competitors of the seaboard refiners but, on the contrary, sell raw sugar to them and are

sources of raw supply for them. Aguirre and San Francisco, do not have refineries but their allotments actually cover turbinado, a semi-refined sugar, which can be produced in raw sugar mills. Neither Aguirre, Guanica, nor San Francisco is a party to this proceeding.[1]

All six of the refined sugar allottees also produce raw sugar directly or through affiliates. In 1948 they produced 356,059 tons of Puerto Rico's total production of 1,108,416 tons of raw sugar.[2] The remaining 752,357 tons were produced by raw sugar mills other than those of the six allottees or their affiliates. Five of the allottees (all except Porto Rican American) have, directly or through affiliates, raw sugar supplies of their own[3] in excess of both the amount permitted to be refined by them under the refined sugar limitation plus the amount they marketed locally

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[1] In addition, none of the three appeared at the hearing before the Secretary on the proposed order athough Guanica later filed a brief (R. 2, 169, 137).

[2] See Appendix III, p. 19 of the appendices to this brief and footnote 3 this page.

[3] For 1948 Porto Rican American produced through its affiliate, Mercedita, 60,982 tons of raw sugar and refined 96,225 tons for mainland and local consumption; Aguirre produced directly and through its affiliates, Machete and Cortado, 96,549 tons of raw sugar and refined 2,372 tons as turbinado sugar for mainland consumption; Roig produced through its affiliates, Ejemplo and Roig, 54,849 tons of raw sugar and refined 44,348 tons for mainland and local consumption; Guanica produced directly 96,935 tons of raw sugar and refined 15,539 tons exclusively for local consumption; Western produced through its affiliate, Igualdad, 40,394 tons of raw sugar and refined 30,691 tons for mainland and local consumption; and San Francisco produced directly 6,350 tons of raw sugar and refined 902 tons as turbinado sugar for mainland and local consumption. It takes approximately 1.07 tons of raw sugar to make one ton of refined sugar (Sugar Regulations, series 1, No. 1, issued Feb. 19, 1935).

See Appendix III to this brief. See also, The Gilmore Puerto Rico Sugar Manual, 1946-1947. At the request of Government counsel at the hearing the Secretary took official notice of this publication (R. 110-111). For Porto Rican American, see pp. 45-47 and 179-182; Roig, pp. 64-67 and 195-198; Western, pp. 79-80 and 167; Aguirre, pp. 42-45, 63-64, and 177-178; Guanica, pp. 74-77; San Francisco, pp. 201-203.

n Puerto Rico.[1] In consequence these five allottees are forced to forego refining of some of *their own* raw sugar supplies and to ship them to mainland refiners for refining,[2] as well as being denied the right to compete for the refining of the raw sugar of other Puerto Rican mills which produce the rest of Puerto Rico's quota sugar. This phase of the situation particularly affects Roig and Western since Aguirre, Guanica, and San Francisco did not choose to fill all their allotments and Porto Rican American did not have a sufficient supply of its own raw sugar to fill its allotment, but had to purchase additional raw sugar from unaffiliated outside raw mills.

The Secretary found that Puerto Rican refiners had a potential refining capacity for 1948 of 485,000 tons (R. 172), or more than twice the capacity necessary to meet both the refined sugar limitation of 126,033 tons plus local consumption requirements in Puerto Rico which for 1948 were 94,923 tons.

The Statutory Question.—§ 205(a) of the Act specifies that the allotments of the Puerto Rican refined sugar limitation shall be made by the Secretary in such manner and in such amounts as to provide a fair, efficient, and equitable distribution of the quota *by taking into consideration* three factors: First, processings of sugar from sugarcane to which proportionate shares pertained; second, past marketings of the allottee; and third, ability of the allottee to market the portion of the quota allotted to him. In the Act these standards read in the conjunctive, not disjunctive. In Order 18—

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[1] For 1948 the aggregate amount marketed locally for consumption in Puerto Rico was 94,023 tons. See Appendix III to this brief. The Secretary may, under § 203 of the Act, fix a local consumption quota for Puerto Rico and allot it. He fixed a quota of 60,000 tons for 1948 (13 F. R. 3692, July 2, 1948; earlier 120,000 tons, 13 F. R. 131, Jan. 9, 1948) but did not allot the quota (13 F. R. 5207-5208, Sept. 8, 1948).

[2] Except 2,468 tons which the Puerto Rican refiners' raw mills were able to sell for consumption locally in raw rather than refined form. See Appendix III to this brief.

a. The Secretary measured the statutory standard of ability to market in the case of four of the six allottees by using 1935 (Porto Rican American), 1936 (San Francisco), 1939 (Guanica), and 1940 (Roig) *past* marketings (R. 173, 174). The court below held that the Act, properly interpreted, requires that the statutory standard of ability to market (if to be measured by performance rather than plant capacity) be measured by current performance, i.e., current, not past, marketings (R. 196).

b. The Secretary measured the statutory standard of past marketings by skipping over the years 1942 to 1947 and using the average of the marketings of the highest five years during the period 1935 to 1941 (R. 172, 174). The court below held that the statutory standard of past marketings plainly includes marketings within the last half dozen years, or at least the more recent of them (R. 196).

c. The Secretary gave equal weight to the statutory standards of ability to market and past marketings but gave no weight at all to the statutory standard of proportionate shares (R. 171, 174). The court below held that the Act, properly interpreted, does not justify the Secretary in failing to give any weight to the statutory standard of proportionate shares (R. 196-197).

Having decided the statutory points adversely to the Secretary and held Order 18 invalid on the statutory grounds, the court below by a divided vote held it was not authorized to decide the issue of the constitutional validity of § 207(b) on which the Order was based. It therefore reversed the Order and remanded the cause to the Secretary for further proceedings not inconsistent with the opinion of the court (R. 198).

Need to Decide Constitutional Question.—In placing the constitutional question ahead of the statutory question (as we have done under "Questions Presented") we are not unmindful of the rule that constitutional questions will not be considered where the case may be disposed of on other

grounds. Normally, a question on the statute would come first. But this case is not within the rule for postponing the consideration of a constitutional issue. The constitutional question needs to be decided for the case at bar cannot be fully disposed of otherwise.

Even if this Court decides all or any of the statutory points in favor of Roig and Western and affirms the judgment below on that ground, the relief would be only a part of what they ask. That is to say, a decision in Roig and Western's favor on the statutory points will give them relief *within* the invalid refined sugar limitation but it will fail to decide whether they are entitled to be relieved *from* that limitation altogether. Their constitutional point is that they are entitled to the latter. The difference is the right of a Puerto Rican refiner to compete with mainland refiners only within an allotted share of 126,033 tons as against the right to compete with them for Puerto Rico's entire mainland sugar quota which for 1948 was 1,023,756 tons.

The Secretary concedes that Roig and Western have a justiciable interest in the constitutional issue. He also concedes that that issue needs to be decided if this Court holds Order 18 valid as regards the statutory question (Br. 59). Our position, as we have said, is that the constitutional issue needs to be decided irrespective of the statutory question. Only by so doing can Roig and Western obtain the quantum of relief to which they are entitled. In consequence the statutory question need be decided only if this Court holds against us on the issue of the constitutionality of § 207(b) on which Order 18 is based. So we come to this Court with a primary question on the Constitution and a secondary question on the Statute.

Constitutional Question Is Before Court on Present Record.—The constitutional question was raised by respondents Roig and Western in their Petition for Stay and Reconsideration of Order before the Secretary of Agriculture (R. 177) and in their Notice of Appeal and Petition for Re-

view (R. 182).[1] It was briefed and fully argued in the court below but it was not there decided.[2]

Respondents Roig and Western opposed the petitions of the Secretary of Agriculture and Porto Rican American for writs of certiorari to review the judgment below on Order 18 as regards the statutory issue. They supported the petition of the Government of Puerto Rico for writ of certiorari to review the judgment below as regards the constitutional issue and to have this Court pass on that issue. In their brief opposing the petitions of the Secretary and Porto Rican American and supporting the petition of the Government of Puerto Rico, Roig and Western stated their purpose (if any of the petitions were granted by this Court) to support the judgment below on the ground that the statutory basis for Order 18 is constitutionally invalid, and pointed out that they are entitled

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[1] As a matter of precaution Roig and Western raised the constitutional issue, as well as the statutory question, before the Secretary even though they recognized (a) that the Secretary is of the view (and in this we agree) that a question as to constitutional validity of any portion of an Act administered by him is to be determined not by him but by the courts (*In the Matter of Mutual Orange Distributors*, 1 A. D. 207, 215; *In re Orange Belt Fruit Distributors*, 1 A. D. 469, 472; *In re Robert Berman*, 1 A. D. 472, 474; *In re Irving Sarnoff*, 1 A. D. 501, 502-503; *In re Abraham Paul*, 1 A. D. 561, 562-563; *In re Sydney Allen*, 5 A. D. 729, 737), and (b) that a constitutional question may on appeal properly be raised in the United States Court of Appeals even though not raised before the administrative officer or agency (*Panitz* v. *District of Columbia*, 112 F. 2d 39 (Ct. App., Dist. Col., 1940). Roig and Western further recognized that the Secretary proposed to allot the amount of the Puerto Rican refined sugar limitation notwithstanding its constitutional invalidity. They therefore participated in the allotment proceedings before the Secretary, including the hearing, to protect their rights so far as it might prove possible through such proceedings. Roig and Western exhausted all available administrative remedies.

[2] In delivering the opinion of the court below Judge Edgerton said: "A majority of the Court are of opinion that since the order is not authorized by the Act we cannot, within established principles of review, undertake to decide whether § 207 (b) of the Act is authorized by the Constitution. All agree that this question has been fully argued, and my own view is that we should decide it." (R. 197)

to urge *in support of the judgment below* any matters appearing in the record, citing *Langnes* v. *Green*, 282 U. S. 531 (1931), and other cases following it. Therefore having raised, briefed, and (as the court below stated in its opinion) "fully argued" the constitutional invalidity of Order 18, Roig and Western are here entitled to urge that matter in support of the judgment below as well as the statutory invalidity of the Order.

Scope of Constitutional Question.—The constitutional question presented by respondents Roig and Western will perhaps be clearer if we point out certain matters which, while somewhat related and interesting in themselves, are *not* now involved. Thus, this case is *not* concerned with the *foreign* commerce of the United States or with the *foreign* commerce of Puerto Rico; nor is it concerned with *local* commerce on the Island. Again, this case does *not* involve any requirement or contention that Puerto Rico must be treated in all respects as a State, or that a law of Congress must operate with complete uniformity over States and Territories. Still again, this case does *not* involve any derogation of Congress' power over commerce, including the regulation of commerce between Puerto Rico and the States. What the case *does* involve,—the precise question presented—is whether Congress must, in exercising that power, desist from arbitrary discrimination against the sugar refiners of Puerto Rico and in favor of the mainland cane sugar refiners on the seaboard.

The Secretary puts the matter with candor, we think, when he stakes the case on the proposition "that Congress may limit or prohibit the importation of goods from a territory in the same manner and to the same extent that it may deal with goods coming from foreign countries." (Br. 67). We take that to be the substance of his position as set forth in the main part of his argument on the constitutional point (Br. 66-71); and particularly so when, in addition to the proposition just quoted, he (and the seaboard refiners as well) draws an analogy to a "protec-

tive tariff" (Br. 69). It is just there that the issue is joined in this case as to the nature and extent of Congress' power —whether it is an arbitrary power or a power limited by due process of law. That is the constitutional question which needs to be decided in this case. It is an open question in this Court in that (as we shall show) it is not foreclosed by prior decisions.

SUMMARY OF ARGUMENT.

This case presents two questions, one constitutional, the other statutory. The constitutional question is concerned with the power of the United States to deal with its outlying possessions. It presents a problem as to the nature and extent of the power of Congress over commerce between Puerto Rico and the States. More specifically stated, it raises the question whether Congress, after the manner of "protective tariff" legislation, may arbitrarily limit the amount of *refined* sugar which may be brought into the States from Puerto Rico, to 12% of Puerto Rico's sugar quota.

Against the argument of the Secretary and the refiners that Congress may limit or prohibit commerce from Puerto Rico in the same manner and to the same extent as if Puerto Rico were a *foreign* country, we urge that such a concept of power is opposed by the due process clause of the Fifth Amendment which embraces the elementary principle of fairness. The clause prohibits arbitrary and gross discrimination against the Puerto Rican refiners in favor of mainland cane sugar refiners. Indeed, we suggest that the limitation on the amount of refined sugar from Puerto Rico is a throw-back to the theory of government which animated Great Britain in the time of George III, namely, to hold the Colonies to the inferior economic position of producing raw materials for processing in the mother country. Such a concept of government went by the board as a result of our own Revolution; its revival is offensive to the Fifth Amendment.

The status of Puerto Rico as "unincorporated territory" carries no legal conclusion in favor of the power urged by the Secretary and the refiners. Puerto Rico is not a foreign country; its people are citizens of the United States. But the political position of the Island does have a bearing on the case: Puerto Rico has no vote in Congress and cannot protect itself of right by political processes. The case exhibits an instance of discrimination without representation. This Court is peculiarly the forum for the determination of the issue.

The constitutional question in the case is an open one in this Court. It is not foreclosed by the Insular Cases or any others cited by the Secretary or the refiners, or as found by us. Examination of those cases reveals them as not concerned with the specific due process question presented here. Arbitrary discrimination is the sum of our complaint. We seek no relief on the ground that due process imposes a judicially enforceable substantive limitation on the power of Congress to regulate economic affairs. We freely acknowledge that power—as manifested, for example, in the non-discriminatory quotas for raw sugar.

The Sugar Act as a whole has a permissible objective but the refined sugar limitation is not an essential part. It has no necessary relationship to the stabilization of sugar production or marketing or to the surplus problem. Its effect and its purpose is to afford protection to the seaboard refiners from *competition* by the refiners of Puerto Rico.

The arbitrary character of the refined sugar limitation appears on the face of the statute and is demonstrated by its legislative history. It freezes Puerto Rican rights in 1948 by the fortuitous figure of tonnage from Puerto Rico to the States in the depression year of 1933. It has been denounced as discriminatory by President Roosevelt and by heads of Departments and in the debates in Congress. Its adverse consequence on the Island is not only to shut off the utilization of Puerto Rico's present refining ca-

pacity but also to debar industrial development of the Island by the expansion of the refining business.

The statutory question is whether the Secretary in allotting for 1948 the Puerto Rican refined sugar limitation has properly construed the three statutory standards of ability to market, past marketings, and proportionate shares. The three standards read in the conjunctive, not the disjunctive. Their use is mandatory and no other standards may be used.

The Secretary (a) actually made use of a non-statutory, extra-legal standard, namely, "restoration of prewar competitive relationships"; (b) erroneously construed the two statutory standards of ability to market and past marketings; and (c) gave no weight at all to the standard of proportionate shares.

The standard of ability to market means *current* ability, not past ability, yet the Secretary used *past* marketings in 1935, 1936, 1939, and 1940 as measures of the ability of four of the six allottees to market refined sugar in 1948. This is contrary to the prior administrative practice of the Secretary in using only current factors as measures of ability to market and is an erroneous construction of the statute.

The Secretary measured past marketings by skipping over marketings during the six years 1942-1947, and using the highest five years marketings during the seven-year period 1935-1941. Exclusion of 1942-1947 marketings is contrary to prior administrative practice of the Secretary in measuring past marketings by marketings during the three or four years last past and not using a "remote" period. The exclusion is an erroneous construction of the statute.

During the prewar period Porto Rican American, one of the six allottees, had a monopoly of Puerto Rican refining. During the years 1940 and 1942-1947 when quotas were suspended by the President or not in effect, Roig and Western made extensive inroads on this monopoly. To restore the monopoly the Secretary made use of a non-statutory,

extra-legal standard, namely, "restoration of prewar competitive relationships." That consideration was given to this standard, is admitted by the Government Witness in his testimony at the hearing on the Government's allotment proposal. The Secretary, in order to achieve his objective of restoration of prewar competitive relationships, or, in more blunt language, the restoration and maintenance of Porto Rican American's monopolistic position at its 1941 level, was forced to manipulate and erroneously construe the three statutory standards.

Abnormal wartime conditions are not a basis for failing to take into consideration marketings during any one or more of the years 1942-1947. The Act does not provide for measuring ability to market or past marketings by a period that the Secretary deems "representative" or for adjusting the standards for "abnormal wartime conditions." Wartime conditions did not have an effect on Porto Rican American substantially different from that had on other allottees. "Abnormal wartime conditions" is the cloak used by the Secretary to achieve the extra-legal objective of restoration of prewar competitive relationships.

ARGUMENT.

I. Section 207(b) of the Sugar Act of 1948 Violates the Due Process Clause of the Fifth Amendment In That the Refined Sugar Limitation Fixed by the Section Arbitrarily Discriminates Against the Sugar Refiners of Puerto Rico in Favor of the Mainland Cane Sugar Refiners.

At this point and for the reasons we have stated, we turn first to the constitutional part of our cause. For it is our contention that, irrespective of whether Order 18 conforms to the statute, the statutory provision fixing the Puerto Rican refined sugar limitation on which the Order was based, is itself invalid so that there could be no valid order at all. The acceptance of this contention will have little significance in the general operation of the Sugar Act (we

deal later with the question whether the limitation is an "integrated part" of the Act), but it will have very real and substantial consequences for refiners in Puerto Rico. A holding that § 207(b) is unconstitutional will break the monopoly it gives to the seaboard refiners, and Puerto Rican refiners will then be free to compete with them in the refining and marketing of all of Puerto Rico's quota sugar (averaging about one million tons annually). What we seek is freedom from the strangle-hold of that arbitrary limitation; and we seek it on the ground that due process of law denies Congress the power to impose any such arbitrary limitation on commerce between Puerto Rico and the States.

§207(b) of the Act provides:

> "Not more than one hundred and twenty-six thousand and thirty-three short tons, raw value, of the quota for Puerto Rico for any calendar year may be filled by direct-consumption sugar."

Our case against the validity of the section involves two propositions: One, that the refined sugar limitation of 126,033 tons is an arbitrary discrimination against the refiners of Puerto Rico; the other, that due process of the law forbids such arbitrary discrimination. We present them separately and in that order.

A. The refined sugar limitation imposed by section 207 (b) is an arbitrary discrimination against the refiners of Puerto Rico.

For 1948 the amount of the Puerto Rican mainland sugar quota was 1,023,756 tons. Of that amount Puerto Rican refiners are permitted to compete for the refining of only 126,033 tons, or less than 12%. The rest of the quota may be shipped only as raw sugar to the ten intervening and other mainland cane sugar refiners for refining by them. Thereby the Act gives the mainland refiners a monopoly of the refining of 897,723 tons, or 88% of the Puerto Rican mainland sugar quota.

On the face of the statute 126,033 tons is an arbitrary and capricious figure. Nothing appears either in the statute itself or, so far as we can find, in its legislative history to show the appropriateness of the figure chosen as tending to the accomplishment of a legitimate end within the competency of Congress. To the contrary, the history of that particular provision shows it as being designed for the accomplishment of an illegitimate end, namely, the suppression of commerce from Puerto Rico for the benefit of the seaboard refiners—a type of suppression practiced against *foreign* countries.

The history of the Puerto Rican refined sugar limitation shows it to be arbitrary. The limitation dates back to the Sugar Act of 1934 (Jones-Costigan Act).[1] That Act imposed on Puerto Rico a refined sugar limitation equal to the highest amount of refined sugar brought into the continental United States from Puerto Rico in any of the years 1931 to 1933. That amount was 133,119 tons,[2] subsequently recomputed at 126,033 tons.[3] The 1934 Act was succeeded by the Sugar Act of 1937 which reenacted the refined sugar limitation of 126,033 tons for the period expiring March 1, 1940,[4] and thereafter the limitation was successively extended until December 31, 1947.[5] The present 1948 Act again extends the limitation—this time to December 31, 1952 (§ 411). However, for approximately half of this 15-year period, 1934-1948, the limitation has been sus-

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[1] The Sugar Act of 1934 was § 8a of the Agricultural Adjustment Act of 1933 (48 Stat. 670, subsequently validated by 49 Stat. 1539).

[2] General Sugar Quota Regulations, Series 2, Jan. 8, 1935.

[3] General Sugar Quota Regulations, Series 2, Rev. 1, Aug. 17, 1935.

[4] 50 Stat. 903, § 207(b).

[5] After expiring Mar. 1, 1940, the Puerto Rican refined sugar limitation was reenacted Oct. 15, 1940, to expire Dec. 31, 1941 (54 Stat. 1178), and thereafter extended to Dec. 31, 1944 (55 Stat. 872), to Dec. 31, 1946 (58 Stat. 283), and to Dec. 31, 1947 (60 Stat. 706).

pended or not in effect.[1] Actually the basis selected as the measure for Puerto Rico's refining is the depression year of 1933 when Puerto Rico's refining industry was new and comprised of but two refineries, one belonging to intervenor, Porto Rican American, and the other to Guanica (South Porto Rico Sugar Co.).[2] Roig did not commence full-scale operation as a refiner until 1937; Western until 1938 (R. 147). As to Roig and Western, then, there is no foundation whatever for the Secretary's assertion that the Puerto Rican refined sugar limitation has a "reasonable historical basis." (Br. 79) The Secretary's view of an "historical basis" is that Puerto Rican refining should be frozen to the amount of refined sugar shipped to the States in 1933 by two refiners (the amount shipped by one was insignificant), while the mainland refiners are given a monopoly of the refining of all other Puerto Rican quota sugar.

Even as to the 126,033 tons, the Puerto Rican refiners are subject to competition from the mainland refiners for the purchase of the raw sugar and the refining of it. On the other hand mainland refiners may refine all raw sugar they are able to purchase within the aggregate of sugar determined by the Secretary to be needed to meet the requirements for consumption in the States. In 1948 this aggregate was 7,200,000 tons of which approximately 5,512,000 tons was cane sugar. As to this amount the mainland refiners are freed by §207(b) from the competition of Puerto Rican refiners save only as to the 126,033 tons.

[1] The refined sugar limitation was not law from Mar. 1 to Oct. 15, 1940, pending the enactment by Congress of legislation extending the original 1937 Act, and was suspended by proclamations of the President pursuant to § 509 of the 1937 Act (50 Stat. 916) for the period from Sept. 11, 1939, to Dec. 26, 1939 (4 F. R. 3889, Sept. 13, 1939, and 4 F. R. 4941, Dec. 27, 1939); and for the period Apr. 13, 1942, to Nov. 28, 1947 (7 F. R. 2826, Apr. 16, 1942 and 12 F. R. 8011, Dec. 2, 1947).

[2] R. 154-158.

The situation above described may be set forth in tabular form as follows (figures in tons):

Sugar Producing Areas	Sugar Quotas 1948[1]	Amount of Quota Sugar Permitted to be Marketed in States as Refined Sugar[2]	Amount of Quota Sugar Permitted to be Competed for by Mainland Refiners	Amount of Quota Sugar Permitted to be Competed for by Puerto Rican Refiners
Domestic beet sugar area	1,687,738	All	All[3]	None
Mainland cane sugar area	413,260	All	All	None
Hawaii	825,000	29,616	All	None
Puerto Rico	1,023,756	126,033	All	126,033
Virgin Islands	6,159	None	All	None
Philippines	240,000	56,000	All	None
Cuba	2,940,467	375,000	All	None
Other foreign countries	63,620	All	All	None

[1] 13 F. R. 7631-7633, Dec. 9, 1948.

[2] Or as turbinado or direct consumption raw sugar.

[3] Available only to beet sugar, not cane sugar, refiners.

The retention of the 126,033-ton figure in the Sugar Acts of 1937 and 1948 as the measure of Puerto Rican refining is itself a mark of oppression; for it freezes Puerto Rican refining at the low level of 1933. Mainland refining may expand with increased population, increased consumption, improved economic conditions, and other factors—but not so for Puerto Rican refining. To have any limitation on Puerto Rican refining, in the face of the freedom accorded the mainland areas and the mainland refiners, is grossly discriminatory. To measure Puerto Rico's rights in 1948 by the fortuitous figure of trade in 1933 is, we submit, arbitrary and capricious without more.

But there is more, and it also is revealed by the legislative history. The Puerto Rican refined sugar limitation

was denounced by President Roosevelt as discriminatory. In approving the 1937 Act he issued a statement in which he said that the bill was "intended primarily to benefit the many thousands of farmers who produce beets and sugarcane and those who, at the place of production, refine the raw material into sugar" but that it had been "seriously impaired in its value by the inclusion of a provision intended to legalize a virtual monopoly in the hands of a small group of seaboard refiners."[1] When the extension of the limitation was under consideration in 1940, President Roosevelt wrote to the Chairman of the House Committee on Agriculture opposing restoration of the limitation (it was not then in effect, having expired by Congressional action), and said:

> ". . . The people of the Territory of Hawaii and the possessions of Puerto Rico and the Virgin Islands are American citizens who compose some of those minority groups in our population with local governments that lack the protections of statehood. If this circumstance were not given adequate consideration, it would be possible to destroy by legislation the livelihood of our citizens in the insular parts of the United States through the enactment of discriminatory prohibitions against their products; and they would possess no legal power to take counter measures in self-defense. Such a course of action, as I have pointed out on a previous occasion, would be tantamount to an imperialistic classification of citizens and a tyrannical abuse of minority rights that is utterly contrary to the American concept of fairness and democracy. Among the cases in point is the proposal to reinstate the former discrimination against the refining of sugar in the insular parts of the United States."[2]

When the matter of the refined sugar limitation was under full consideration in connection with the enactment of

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[1] Hearings before the Committee on Agriculture, House of Representatives, on Bills Relating to Sugar Legislation, Serial J, 76th Cong., 3d sess., April 10-12, 1940, pp. 212-213.

[2] Id., 214.

the 1937 Act, the Secretary of Interior wrote the Chairman of the House Committee on Agriculture in part as follows:

> "... The audacity of one little group of manufacturing monopolists, the cane refiners, in demanding a legalized monopoly for themselves illustrates the difficulties that Congress must face under a quota system in dealing with corporate aggregations of wealth which control the necessities of the daily life of our citizens. This, despite the long court record of this group of restraint of trade and the fact that the United States Tariff Commission investigated their claims and found they were not warranted in seeking governmental protection against even foreign competition. They insist on a legalized monopoly for themselves through embargoes against both domestic and foreign competition, ..."[1]

Later on July 12, 1937, the Secretary pointed out:

> "... The bill contains no restrictions on domestic cane sugar refining operations except with respect to the insular parts of the United States. This would mean that, contrary to the fundamental principles of democratic government, one group of American citizens would be compelled to suffer a wholly unnecessary and undesirable discrimination. It would also mean the setting up of trade barriers within the United States which would be contrary to the long-established principle of guaranteeing each part of our country the right to exchange its products freely with all other domestic areas . . . Under such a policy, which would tend to be expanded from time to time as a result of the pressure of special groups, the economic welfare of the insular parts of the United States could be completely destroyed . . ."[2]

and again on July 22, 1937:

> "... The administration's concern is that Hawaii, Puerto Rico, and the Virgin Islands receive fair treat-

[1] P. N. 135554, Dept. of the Interior, May 7, 1937.

[2] Hearing before the Committee on Finance, U. S. Senate, on H. R. 9654, 76th Cong., 3d sess., Oct. 2-3, 1940, p. 68.

ment. There is no limitation upon the refining of sugar in the mainland and there should be no discrimination with respect to the conduct of refining operations in our territories and island possessions. The provision which the refiners desire to become permanent law would deprive Hawaii, Puerto Rico, and the Virgin Islands of their rights to engage in interstate commerce in equality with the 48 States . . .'[1]

Turning from the Executive to the Legislative Branch, the legislative history again shows the arbitrary and gross discrimination involved. The debates on the floor of the House and Senate at the time the Sugar Act was originally enacted, at the time it was extended in 1940, and again in 1941, clearly demonstrate that the Act was designed to discriminate against Puerto Rico, Hawaii, and the Virgin Islands, in favor of the mainland refiners. Extracts from these debates are set forth for the convenience of this Court in Appendix II to this brief.

Restrictions on Puerto Rico's refining were urged by proponents in Congress as a "slight favor" to mainland refiners, to "take care of our own people," and in furtherance of "the first law of nature—self-preservation." The restrictions were necessary "to defend American labor," and to protect mainland refiners' "investments."

Never was the discrimination in good faith denied. It was merely excused.

Congressional opponents of the discrimination pointed out the fact of the trade barrier and that Puerto Ricans were not foreigners but citizens. It was said that similar discrimination against manufacture of Southern cotton or refining of Texas oil would not be countenanced. The policy of limiting the insular possessions in the manufacture of their own raw materials was the same as the British colonial exploitation policy that resulted in our Revolution. Preservation of the Sugar Trust's monopoly by legislation was being sought when competition should be encouraged.

[1] Id. p. 69.

Less than three or four thousand laborers could possibly be displaced even should Puerto Rico ever refine all its mainland sugar quota. The seaboard refiners already received a tariff subsidy. The Tariff Commissioner had reported against any need for increased duties even on refined sugar from foreign countries.

Everywhere one turns—to the Act, its legislative history, the President and his cabinet—even proponents of the legislation in Congress—the arbitrary and grossly discriminatory character of § 207(b), the denial of equal protection of the law embodied in it, is obvious. Only the Secretary of Agriculture and the intervening mainland cane sugar refiners are blind to that which is apparent to all others. But it was not always so as to the Secretary. Originally he saw, and in vigorous words opposed, the discrimination in a statement which his subordinates prepared for the Chairman of the Committee in charge of the bill in the House.[1] "Complete violation of traditional American policy," establishment of "discriminations against parts of America, inhabited by American citizens, in favor of a few mainland companies already highly privileged by this legislation," "essence of Old World colonialism," were some of the phrases used.

The Brookings Institution, in its report "Porto Rico and its Problems", published in 1930, states:

> "Cane is Porto Rico's leading crop and chief source of wealth. Of her total exports, which were valued at over $108 millions in 1928, well toward $56 millions were accounted for by three cane products—sugar, molasses, and alcohol. More than two-fifths of the Island's cultivated area and more than 11 per cent of its total area is under cane. Sugar manufacturers and cane cultivators pay directly nearly one-fourth of the insular and local taxes and support many accessory lines of business which contribute to the coffers of the government. In a word, the economic fortunes of Porto Rico

[1] Pp. 12-14 in the appendices to this brief.

are at present largely dependent upon this industry." (p. 611)

Sugar is Puerto Rico's leading industry. § 207(b) of the Act, however, denies to Puerto Rico greatly needed additional income from its most important industry. The Secretary of the Interior has recently again denounced the discrimination embodied in the Puerto Rican refined sugar limitation. In April of last year he wrote the Chairman of the Committee on Public Lands, House of Representatives, as follows:

". . . An example of such a discriminatory provision is to be found in subsection 207(b) of the 'Sugar Act of 1948' . . . This provision limits the amount of refined sugar which Puerto Rico may ship to the continental United States, a limitation which does not apply equally to the several states, and thus treats Puerto Rico as though it were not a part of the United States, but a foreign country. It has also proved to be detrimental to the insular economy having cost Puerto Rico, between the years 1934 and 1946, an estimated $220,000,000 in revenue. If this provision were repealed and Puerto Rico were allowed to market its sugar in a refined state, Puerto Rico would realize an additional $18,000,000 to $19,000,000 a year and would benefit from a resulting increase in job opportunities, more consumer income, and greater industrial development."[1]

Without § 207(b) as a bulwark, intervening and other mainland cane sugar refiners stand a chance of losing to Puerto Rico this large annual income. Release from this arbitrary and grossly discriminatory refined sugar limitation of which we complain, would permit the Puerto Rican sugar industry to go forward in the expansion and development of refineries, thus aiding industrialization of the Island. The ten mainland cane sugar refiners have inter-

[1] Hearings on H. R. 5876 before a Subcommittee of the Committee on Public Lands, House of Representatives, April, 1948. See also H. Rept. No. 2035, 80th Cong., 2d sess.

vened in this case in the hope of saving this $18 or $19 million dollars a year for themselves at the expense of Puerto Rico. They are even unwilling to compete with Puerto Rican refiners for this amount and insist on a statutory monopoly that will assure it to them.

The Secretary offers several points in defense of the arbitrary discrimination in the refined sugar limitation, but they are without persuasive merit. Thus, for example, he argues that the quotas provided by the Act (§§202-205) on the amount of sugar that may be brought into the States, constitute "a restriction on the mainland refiners ... more severe than the [refined sugar] limitation on the Puerto Rican refiners" (Br. 82, bracketed matter added). The facts are that before the Sugar Acts *both* the mainland refiners and Puerto Rican refiners had the right to buy their raw sugar supplies anywhere, in any quantity. Under the Sugar Acts *both* mainland refiners and Puerto Rican refiners are limited to acquiring quota raw sugar. Actually under the Act no refiner, mainland or Puerto Rican, can refine and market in the States non-quota raw sugar, that is, raw sugar from Cuba, Louisiana, Florida, Puerto Rico, Hawaii, or elsewhere, in excess of the sugar quota for the respective area. A Puerto Rican refiner is subject to precisely the same restriction as the mainland refiner in this respect. Both are denied access to raw sugar in excess of quotas. *In addition*, Puerto Rican refiners (but *not* the mainland refiners) are by §207(b) limited to acquiring, for refining for consumption in the States, only 126,033 tons of quota raw sugar while mainland refiners may acquire any quota raw sugar for such purpose.

Again, the Secretary argues that the total amounts of raw sugar to be acquired varies from year to year with the Secretary's determination of domestic consumers' needs, while Puerto Rican refiners are guaranteed a fixed amount of 126,033 tons (Br. 82). But the answer is clear: The opportunity of the mainland cane sugar refiner to compete for a share of a total amount of raw cane sugar

ranging around 5,500,000 to 6,000,000 tons from year to year is of far greater value than the opportunity of the Puerto Rican refiner to compete for (not be guaranteed) only an allotted share of 126,033 tons.

The Secretary approaches the illusory when he points out (Br. 72) that the Act places no restriction on the right of any person to build a refinery and engage in the business of refining sugar from sugarcane, or on the right of any refiner in Puerto Rico to market his sugar anywhere in the world except in the States. So far as Puerto Rico is concerned, the right to build a new refinery and enter into the refining business is in large measure an empty right; for with the States as the principal market, production of additional refined sugar in Puerto Rico through building new plants or increasing capacity of existing plants would be futile in the face of the overall limitation of 126,033 tons. It is economically feasible for the mainland refiner to market sugar anywhere in the world,[1] *including* the States; but it is not economically feasible for the Puerto Rican refiner to market his sugar, produced within the "tariff wall" under tariff protected conditions, elsewhere than in the United States.

The mainland cane sugar refiners repeatedly state in their brief that the Sugar Acts restrict them to the use of 64% of their potential capacity which they assert to be 7,000,000 tons annually and that for this reason the Sugar Acts discriminate against them as fully as against Puerto Rican refiners. This "me too" theme runs throughout their brief and is apparently the main basis for their denial of the arbitrary character of the Puerto Rican refined sugar limitation.

Excluding the 1,687,738-ton domestic beet area sugar quota, the mainland seaboard refiners were entitled to compete for 5,512,262 tons of quota cane sugar for 1948, or ap-

[1] The benefit of drawback of duty permits the mainland cane sugar refiner to market abroad Cuban or other dutiable sugar refined by him.

proximately 79% of their asserted potential capacity. In this competitive field they actually marketed 5,155,558 tons for 1948,[1] or 74%, of their asserted potential capacity. In comparison, the Secretary himself found that the potential capacity of the Puerto Rican refiners for 1948 was 485,000 tons (R. 172). However, Puerto Rican refiners were limited to competing for 126,033 tons for mainland consumption plus 94,023 tons[2] for local consumption,—a total of 220,056 tons. This is only 45% of the Puerto Rican refiners' potential capacity as compared with the cane sugar refiners' actual figure of 74% for 1948. All that Roig and Western here urge is that they are entitled to *compete* for (not have a monopoly of) the remaining 897,723 tons of Puerto Rico's quota sugar which is now a monopoly of the mainland cane sugar refiners. The Puerto Rican refiners' geographic position makes it impossible (because of the back haul involved) for them successfully to compete for the refining of quota cane sugar from other producing areas except the approximately 6,000 tons of Virgin Islands quota sugar.

There is no sound factual basis for the argument that the Sugar Acts imposed any harmful restriction on the seaboard refiners' capacity that is required to be compensated for by the Puerto Rican refined sugar limitation. The Secretary states that the mainland refiners refined in 1948 only 69.1% of the total refined sugar distributed in the States (Br. 83), while in 1929, their highest pre-1934 Act year, they refined 76.9%. In Appendix I to his brief (p. 90) the Secretary makes reference only to percentage figures, not to quantities, and omits the years 1942 to 1947. However, from the Secretary's own data for the years shown, it appears that from 1929 to 1948 the total amount of refined sugar increased by 379,000 tons. From 1934 to date Puerto Rican refiners remained frozen by the refined sugar limita-

[1] U. S. D. A. Release 296-49, Feb. 11, 1949.

[2] See Appendix III to this brief.

tion. The decrease in the *percentage* of mainland cane sugar refining was attributable not to Puerto Rican refiners' competition for there was none save for the 126,033 tons, but to competition from the beet sugar refiners whose total distribution over the same period increased by several hundred thousand tons.

The mainland cane sugar refiners by means of elaborate tabular appendices to their brief (Apps. B and C) apparently argue that the gross discrimination embodied in § 207(b) is cancelled out by Government benefit payments to cane growers and increased sugar prices ("quota premiums" they call them) attributable to the general sugar quota system. We will likewise deal with the details of this argument in an appendix, i.e., Appendix I, pp. 1-3 of the appendices to this brief. For the moment it is sufficient to point out that it is no answer to the question of *power* involved in this case for the seaboard refiners to bring forward various matters of *policy* which have animated Congress in dealing with other aspects of Puerto Rico's economy. It is not to be supposed that Congress would be as harsh with the Island in all respects as it is with regard to refined sugar. And it is strange doctrine to suggest that the grant of a favor on the one hand justifies an abuse of power on the other. The stuff of this case in this Court—the point is worth repeating (*supra*, p. 14)—concerns the nature and extent of Congress' *power* over Puerto Rico's trade with the States.

In summary, the face of the Sugar Act shows, and the Secretary concedes, that the purpose of the Puerto Rican refined sugar limitation is to protect the mainland refiners from competition with Puerto Rico as to 88% of Puerto Rico's mainland sugar quota—to give the mainland refiners a monopoly over the refining of all save 126,033 tons of that quota. For 1948 this amounted to a monopoly for the refining of 897,723 out of the 1,023,756 tons of that quota. Even as to the 126,033 tons Puerto Rican refiners

have to meet the competition of the mainland refiners. Striking down § 207(b) of the Act would only remove the monopolistic protection now given the mainland refiners and permit Puerto Rican refiners to compete with them in the refining of the whole of the Puerto Rican quota of raw sugar. The Secretary found (R. 172) that even at present Puerto Rican refiners have the capacity to refine 485,000 tons, or more than twice the amount needed both for Puerto Rico's refined sugar limitation and for local consumption in Puerto Rico. The Act denies the presen' Puerto Rican refiners the right to use that capacity in competition with the mainland refiners.

B. Section 207(b), by imposing an arbitrary discrimination against the refiners of Puerto Rico, violates the due process clause of the Fifth Amendment.

Constitutional Question is an Open One.

At the outset we think it appropriate to say that so far as we have been able to ascertain the precise constitutional question presented by this case—whether commerce between Puerto Rico and the States is protected by due process of law against arbitrary discrimination by Congress—is an open one; it has never been decided by this Court. And we venture to suggest that the answer to the question will have deep significance in our own system of government—may, indeed, be significant on a wider front. For the case has to do with nothing less than the question of how a great power deals with its dependencies—more particularly it is concerned with relationships between the United States and Puerto Rico, and the nature and extent of the power of Congress over commerce between the Island and the States.

Even if the question were thought to be foreclosed by earlier decisions, we should not hesitate to ask the Court to re-examine them. Of the relatively few which may be invoked against our position the Insular Cases are the most

nearly pertinent, particularly as exemplified by *Downes* v. *Bidwell*, 182 U. S. 244 (1901). We will discuss that case and others, in due course. At the moment and in the present connection we desire to say only this: The Insular Cases represent the effort by this Court, when confronted with a new and pressing problem on the heels of the war with Spain, to formulate doctrines for the assimilation of recently acquired outlying possessions into our constitutional system; but they should not stand in the way of a full consideration of the present problem in the light of what has happened in almost a half century since the Insular Cases were decided.

On the basic problem in this case our contention is that commerce between Puerto Rico and the States is protected by due process of the law against arbitrary discrimination by Congress. We recognize of course that Roig and Western's litigable interest may be restricted to the adverse effect of § 207 (b) on themselves, but we point out that this adverse effect extends to Puerto Rico as a whole, so that the fate of Roig and Western is tied up with the fate of the Island. The larger interests of the Island are set forth in the brief of the Government of Puerto Rico.

ARBITRARY DISCRIMINATION IS THE SUM OF OUR COMPLAINT.

We do not ask relief on the theory that due process of law imposes a judicially enforceable substantive limitation on legislative power in the regulation of economic affairs. We freely acknowledge a large power in Congress to regulate commerce between Puerto Rico and the States, just as it may regulate commerce among the States themselves—as for example in *Mulford* v. *Smith*, 307 U. S. 38 (1939); *United States* v. *Darby*, 312 U. S. 100 (1941); *Wickard* v. *Filburn*, 317 U. S. 111 (1942). We invoke rather judicial protection against arbitrary discrimination in the exercise of that power. Just as the courts strike down state laws which discriminate against national interests

in interstate commerce so may they strike down Congressional laws which discriminate against local interests in such commerce. If Congress were to single out a State of this Union and fix grossly discriminatory quotas on the amount of its cotton, oil, beets or cane which could be sent, in manufactured or refined form, to other States there would be little doubt that the quota would fall. Despite the absence of an equal protection clause running against Congress (cf. the Fourteenth Amendment against the States), it has never been denied that due process includes such an indispensable attribute of freedom as equality before the law, *Truax* v. *Corrigan*, 257 U. S. 312, 331-332 (1921); *Steward Machine Co.* v. *Davis*, 301 U. S. 548 (1937). Nor can it be doubted that due process limits the commerce power of Congress; if citation of authority be needed it is enough to say that such a limitation has been accepted since the earliest mention of the matter in *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312 (1893), to the latest full-scale consideration in *Currin* v. *Wallace*, 306 U. S. 1 (1939), and *Wickard* v. *Filburn*, 317 U. S. 111 (1942).

In what we have said up to now we have been endeavoring to put before the Court the affirmative argument for the application of the due process clause to invalidate the arbitrary limitation imposed on Puerto Rico's right to trade with the States. But we think our argument, especially the part still to be offered, will stand in better perspective if, at this juncture, we turn to the Secretary's brief in order to see what manner of showing can be made against the position of respondents Roig and Western and in favor of the Secretary's position that Congress may deal with commerce from Puerto Rico to the States on exactly the same basis that it may deal with commerce from *foreign* countries.

"Protective Tariff" is the Sum of the Secretary's Case.

From whatever angle the basic question in this case is approached by the Secretary, as well as by the intervening refiners, the matter comes down to the justification of the Puerto Rican refined sugar limitation on the theory of a protective tariff—protection of the seaboard refiners, be it noted, against competition from another section of the United States economy. When the Secretary and the seaboard refiners maintain that Congress may impose a protective tariff as against trade from Puerto Rico, they are —despite their protestations to the contrary—contending for the possession by Congress of an absolute and arbitrary power over that trade. It is against this conception of power in Congress to play off one part of the United States against another that we are contending.

Cases Cited by the Secretary.

The Secretary opens his constitutional argument with cases—*Buttfield* v. *Stranahan*, 192 U. S. 470 (1904), and *Hampton & Co.* v. *United States*, 276 U. S. 394 (1928)—on the point that Congress is free to deal at its pleasure with *foreign* commerce. That these cases, as well as others, establish the powers as to *foreign commerce*, no one would deny. But whatever else may be true in the present cause, this much at least is indisputable: Puerto Rico is not a country foreign to the United States. It is within the allegiance and under the jurisdiction of the United States. Its citizens are citizens of the United States. Despite the "protective tariff" argument on which the Secretary and the seaboard refiners heavily rely, Puerto Rico is *within*, not outside, the "tariff wall" of the United States. Duties under the Tariff Act of 1930 are not applicable to imports into the States from Puerto Rico and are applicable

to imports into Puerto Rico from foreign countries.[1] So, the Secretary is under the burden of establishing that, though Puerto Rico is not foreign, yet Congress may deal with commerce between Puerto Rico and the States precisely as if it were foreign commerce. For that purpose he invokes several cases, all of which we will examine but none of which, we submit, establishes his position.

Downes v. *Bidwell*, 182 U. S. 244 (1901), already mentioned by us as the most nearly pertinent case against our own contention, is the Secretary's principal reliance. But that case was concerned, not with a due process problem, but specifically with the validity of a federal impost on goods from Puerto Rico challenged as in violation of the express requirement that such imposts shall be "uniform throughout the United States." The diversity of views of the Justices (they divided 5-4 and delivered five opinions) attests the complexity of the problem and the lack of agreement on its constitutional solution. No opinion commanded a majority. But it is unmistakably clear that the question had to do with the geographical aspect of the provision relating to uniformity "throughout the United States." Thus, by Justice Brown in announcing the conclusion and judgment:

> "... We are now asked to hold that it [Puerto Rico] became a part of the *United States* within that provision of the Constitution which declares that 'all duties, imposts, and excises shall be uniform throughout the United States' ...

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[1] U. S. C., title 19, § 1001; title 48, § 739.

The seaboard refiners assert that as a "legal fact" Puerto Rico is "not a part of the United States". That assertion begs the question as to whether the due process clause prohibits arbitrary exercise of the power of Congress to regulate commerce between Puerto Rico and the States. Even prior to its being embraced in the customs union of the States, Puerto Rico was not a "foreign country" within the meaning of the protective tariff laws, but was a "territory of the United States" (*DeLima* v. *Bidwell*, 182 U. S. 1 (1901)).

> "To sustain the judgment in the case under consideration it by no means becomes necessary to show that none of the articles of the Constitution apply to the Island of Porto Rico. *There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several states.*" (pp. 249 and 276, emphasis and bracketed matter supplied)

Again, Justice White, with whom Justices Shiras and McKenna concurred, was of the view that—

> ". . . undoubtedly there are *general prohibitions in the Constitution* in favor of the liberty and property of the citizens . . . *which are an absolute denial of all authority* under any circumstances or conditions to do particular acts." (p. 294, emphasis supplied)

The due process clause contains no specific geographical limitation.

Nor is *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945), a controlling precedent. That case was concerned, not with any problem at all in respect of the power of Congress and possible limitations thereon, but with the validity of a State *ad valorem* tax on goods from the Philippines challenged as in violation of the express prohibition of imposts by a State. The Court, using the "original package" rule, invalidated a State *ad valorem* tax on hemp from the Philippines. The Court said that the articles in question were "imports" because "the place from whence they are brought is not a part of the United States in the constitutional sense to which the provisions with respect to [taxation of] imports are applicable." The majority confined the discussion to the Philippines (p. 672); they cited Congressional statutes—e.g., the Philippines Independence Act—which have no comparable counterparts with respect to Puerto Rico; four Justices dissented from the application of the original package rule; and—a most unusual occur-

rence—*five* Justices protested against the economic consequences of the decision.

These cases, then, are concerned with specific geographical limitations on the *taxing* power of the Nation and States. They do not preclude this Court from determining, on the merits and having regard to specific differences in applicability of various provisions of the Constitution, the extent of the *regulatory* power of Congress over commerce between Puerto Rico and the States. So far as they are concerned, they leave the question in this case open for decision now.

Cincinnati Soap Co. v. *United States*, 301 U. S. 308 (1937), does not go to the present issue. It was concerned with the validity of a federal excise on the processing of cocoanut oil in the United States. The law was of general operation; it did not single out the products of the Philippines for the imposition of the tax. Tested as a tax it was "unassailable", said the Court. The principal question in the case arose over the "earmarking" of the proceeds to the extent they were derived from oil from the Philippines—a very real question at that time in view of the decision (the preceding year) in *United States* v. *Butler*, 297 U. S. 1 (1936) where a divided Court attached adverse consequences to the earmarking provision in the Agricultural Adjustment Act of 1933.

The liquor cases[1] cited by the Secretary are of no moment. Whatever the explanation of the many and diverse decisions concerning legislative power over intoxicating liquors, this Court wrote its own caveat against them when, sustaining the Webb-Kenyon Act, it said that "the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace." *Clark Distilling*

[1] *Endleman* v. *United States*, 86 Fed. 456 (C. C. A. 9, 1898), and *Bacardi Corp.* v. *Domenech*, 311 U. S. 150 (1940).

Co. v. *Western Md. R. Co.*, 242 U. S. 311 (1917). Nor does *Alaska* v. *Troy*, 258 U. S. 101 (1922), also invoked by the Secretary, help his cause. The case is not even in point; it was concerned with a different question and holds merely that a Territory is not a "State" within the specific prohibition against preferences for "ports of one State over those of another."

Thus the cases cited by the Secretary appear not to support his contention that Congress may deal with commerce between Puerto Rico and the States precisely as if it were *foreign* commerce; and we repeat our earlier statement that as far as we have been able to ascertain the precise constitutional question presented by this case has never been decided by the Court. But the Secretary also offers other considerations in support of his position. They are concerned with (a) the integration of the refined sugar limitation into the Sugar Act as a whole, and (b) the status of Puerto Rico as "unincorporated territory" of the United States. We turn now to their examination.

The Puerto Rican Refined Sugar Limitation Is Not an Integrated Part of the Sugar Act.

The Secretary argues that the refined sugar limitation fixed by § 207(b) is an "integrated part" of the Sugar Act of 1948 (Br. 60). The Secretary would seem to be urging that since the general quota system is valid, the tail goes along with the dog and therefore the Puerto Rican refined sugar limitation is valid. The tail belongs to a wholly different breed of dog.

This part of the Secretary's argument is mainly assertion, with little supporting proof; and it is open to the objection that the assertion does not accurately describe the situation. If we may be permitted a counter-assertion, we suggest that the limitation is an "engraftation" upon, rather than an "integrated part" of, the Sugar Act. § 207(b) was set up at the behest, and for the benefit, of the mainland refiners. The most cursory

examination of messages of President Roosevelt and the Secretary of the Interior, quoted *supra*, pp. 22, 24, and of the debates on the floor of Congress, demonstrates this. See p. 6 of the appendices to this brief.

The President's message (78 Cong. Rec. 2176) in which he first asked Congress for sugar legislation, indicates that he had in mind a raw sugar quota system for the benefit of farmers and consumers—not a refined sugar quota system (which he vigorously opposed) for the benefit of the mainland refiners. The President set forth in specific figures the quotas that he had in mind and in each instance they were raw sugar quotas, not refined sugar quotas or limitations. And he nailed the refined sugar limitation down for what it is, in his statement accompanying his approval of the Sugar Act of 1937. He there said (the statement is quoted *supra*, p. 22) that the original bill had been "seriously impaired" by the inclusion of the quota legalizing the "virtual monopoly in the hands of a small group of seaboard refiners."

In Congress Representative Hope of Kansas openly declared: "*All these refiners are doing is hitch-hiking on a bill for the relief of the domestic sugar producing industry.*" (81 Cong. Rec. 8439.) The situation was fairly analyzed by Representative Lanzetta of New York when he said:

> "There are two phases to this bill—one agricultural wherein raw sugar quotas are allotted to the various producing areas in the United States and some foreign countries, and the other industrial, wherein limitations are put upon Hawaii, Puerto Rico, and the Virgin Islands as to the amount of direct consumption or refined sugar which they can produce.
>
> "Puerto Rico has no quarrel whatsoever with the quota . . . insofar as raw cane sugar is concerned. . . . They contend that if no limitation is placed in this bill on the direct consumption or refined sugar manufactured in the continental United States, that there should be no restriction placed on the . . . direct consumption or refined sugar [manufactured] in Puerto Rico. . ."—81 Cong. Rec. 8301, bracketed word added).

There is no showing, nor does the Secretary suggest, that the refined sugar limitation has any necessary relationship to the stabilization of sugar production or marketing or to the surplus problem. Obviously the refined sugar limitation does not affect the total supply of and demand for sugar but merely the question as to who may refine Puerto Rico's raw sugar produced for continental consumption—whether the mainland refiners shall have a monopoly for refining 88% of it, or whether they shall have to compete with Puerto Rican refiners for the refining of 100% of such sugar, instead of only 12%.[1]

Mulford v. *Smith*, 307 U. S. 38 (1939), and *Wickard* v. *Filburn*, 317 U. S. 111 (1942), cited by the Secretary (Br. 76), dealt with plans to maintain a proper balance in the supply of, and demand for, tobacco and wheat. Those cases, involving laws of general operation, in no wise dealt with arbitrarily discriminatory quotas or with anything remotely resembling an arbitrary limitation on processing in one area of the United States for the benefit of processors in another area. In *Gay Union Corporation* v. *Wallace*,[2] the United States Court of Appeals for the District of Columbia Circuit, sustaining the validity of the Sugar Act of 1937 as a regulation of commerce, had before it and

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[1] The Secretary (Br. 62) attempts to tie in the Puerto Rican refined sugar limitation as an integral part of the Act by referring to certain provisions of the Act and the House Committee on Agriculture's report thereon. These provisions state that the Act is for the protection of "those engaged in the sugar industry" and that the bill had as a primary object "the stabilization of the sugar producing, refining, and importing industry." The Secretary implies that the mechanism of the refined sugar limitation on Puerto Rico is the method of accomplishment of these objectives. This is in error.

Stabilization is an objective under the Act both in the mainland cane sugar area and the domestic beet sugar area with respect to which there are no refined sugar limitations, as well as the offshore sugar areas with respect to which there are such limitations. The Act accomplishes the objective by limiting the quantities of sugar (not the quantities of refined sugar) coming to market from each sugar producing area.

[2] 71 App. D. C. 382, 112 F. 2d 192 (Ct. App. D. C., 1940), cert. denied 310 U. S. 647 (1940).

was dealing with solely the non-discriminatory raw sugar quota plan. The case in no wise involved the refined sugar limitations imposed on Puerto Rico, Hawaii, and the Virgin Islands.

The argument is not sound that validity of the general regulatory scheme will carry with it the validity of all its parts. Our attack is upon the refined sugar limitation as a separable part of the Sugar Act—a part that can be excised without jeopardizing the remainder of the Act.[1] The absence of a separability clause is not controlling. Inclusion of such a clause does little more than emphasize well settled rules of statutory construction.

The Status of Puerto Rico.

The Secretary makes much of the point that Puerto Rico is an "unincorporated territory" of the United States (Br. 63). Even assuming *arguendo* the correctness of the characterization, we vigorously deny the legal results sought to be attached to it. If the doctrine of incorporation has any definite significance, it is with respect to the applicability of various guaranties of the Constitution within a given territory—for example, whether a person there accused of crime is entitled to trial by jury within the meaning of the jury provision. On such matters the inquiry moves on lines similar to those where the Court is called upon to determine, pursuant to what has been called a "selective process," whether a specific protection in the Bill of Rights is deemed so fundamental as to be embraced by the Four-

[1] The seaboard refiners emphasize that under §§ 408 and 207 (g) of the 1948 Act the President may by proclamation suspend the operation of quota provisions except that the Puerto Rican and other refined sugar limitations may not be suspended unless the President in addition makes a specific finding with regard to those limitations. The seaboard refiners urge that this indicates that the Puerto Rican refined sugar limitation is an integrated part of the Act. To us the fact that a specific finding is required for suspension of refined sugar limitations, separate and apart from the suspension of the rest of the Act, indicates that Congress itself regarded the Puerto Rican and other refined sugar limitations as separable from the rest of the Act.

teenth Amendment and made applicable to the States. In such situations the terms "incorporation" and "fundamental" involve conclusions of law rather than rules for judicial guidance.[1] In any event, and emphatically so, this case is concerned, not with the power of Congress to legislate in respect of local affairs on the Island, but with the protection of the life-line of trade between Puerto Rico and the States. The Secretary tends to confuse the matter before the Court when he declares that the "precise issue" is whether Congress, in the exercise of its "*plenary powers to govern a territory* and to regulate its commerce may regulate the economy of the territory differently from the economy of the United States" (Br. 65, emphasis supplied).

Discrimination Without Representation.

There is, however, an aspect of Puerto Rico's status to which the Secretary does not allude but which we deem highly significant. We refer to Puerto Rico's want of representation in Congress. In fact, as we now resume our own argument (after having examined the case made on behalf of the Secretary), we suggest, first, that this Court is peculiarly the forum for the decision of the constitutional question raised in this case and, second, that there are special historical grounds for deciding it in favor of the Puerto Rican refiners.

This Court is peculiarly the forum for two reasons: One, because in truth there is no other forum in which Puerto Rico may *of right* be heard on her grievance against such arbitrary action as is here complained of; and the other, because of the function of this Court in our constitutional system for determining whether powers exerted by government are within the consent of the governed. These reasons are strongly interwoven in this case. In

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[1] See comments on the phrase "affected with a public interest" in *Ribnik* v. *McBride*, 277 U. S. 350 (1928), and then compare *Nebbia* v. *New York*, 291 U. S. 502 (1934). See also comments on "direct" and "indirect interference" (with interstate commerce) in *Di Santo* v. *Pennsylvania*, 273 U. S. 34 (1927) and then compare *California* v. *Thompson*, 313 U. S. 109 (1941).

exposition of principles involved in the doctrine of judicial review in constitutional cases this Court has indicated a certain relationship between the exercise of judicial power and the operation of political processes. Thus, for example, the suggestion, originating with Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 435 (1819), and renewed by Stone in *Helvering v. Gerhardt*, 304 U. S. 405, 416 (1938), that judicial intervention may not be needed to protect the States against national encroachment, that is, to shield the parts from action by the whole—has for its basis the fact that the people of the States, acting through their representatives in the Senate and House, are in position to protect themselves. But the people of Puerto Rico are outside that reasoning. They have no vote in the body which imposed the limitation on them. This case, then, exhibits arbitrary discrimination against people who are denied representation; it presents an appropriate occasion for judicial inquiry.

Special Historical Grounds for Relief.

There are special grounds, on the firm foundation of our early history, why the judicial inquiry in this case should result in judgment in favor of Puerto Rico. For § 207(b) of the Sugar Act of 1948, with its limitation on sugar refining in Puerto Rico, is a throw-back to the mercantilist theory of the Revolutionary period.

> "The British Empire of which George III became sovereign in 1760 was shaped largely by the principles of mercantilism . . . By mercantilist theory, the function of colonies was to produce raw materials for the use of the mother country, to consume its manufactures and to foster its shipping; and the purpose of the Laws of Trade and Navigation was to ensure that the English colonies fulfilled these ends. This implied, as mercantilists readily admitted, that the colonies were to remain dependent agricultural regions, closely tied to the economy of an industrialized mother country. No mercantilist saw any impropriety in consigning the Western Hemisphere to a position of perpetual economic inferiority."—Prof. John C. Miller, Origins of the American Revolution, pp. 4-5 (1943).

We urge that the Constitution of the United States was not framed to grant Congress power to impose on commerce with our present day "colonies" the same kind of regulation we successfully fought when Parliament attempted to impose it on the thirteen original Colonies. The issue here presented was decided by the People at the time of the Revolution and their decision was woven into our Constitutional fabric. The position of the ten intervening refiners is that the Constitution does permit Congress to compel Puerto Rico to function primarily as a producer of raw material for the seaboard refiners and to consign Puerto Rico and its refiners to a position of perpetual economic inferiority. The Secretary agrees with the seaboard refiners. We think the primary principle of fairness embodied in due process of law is opposed to any such conception of the power of government under the Constitution of the United States.

II. Order 18 Is Invalid In That It Allots the Refined Sugar Limitation Contrary to the Requirements of Section 205(a) of the Sugar Act of 1948.

The statutory question concerns the failure of Order 18 to conform to the statuory standards set forth in §205(a) of the Act. The necessity for decision of the statutory question arises only if this Court holds against us on the constitutional question (see *supra*, p. 11.) Basically the statutory aspect of this case is a fight between three Puerto Rican refiners—two Davids, Roig and Western, against a Goliath,[1] the intervenor Porto Rican American. The Secretary is on Goliath's side.

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[1] Goliath, "6 cubits and a span" (9 ft. 7 in.) tall, approached twice the size of David who was "but a youth" and "a stripling." 1 Samuel, ch. 17.

A. Order 18 is actually based on a standard not authorized by law.

Section 205(a) of the Act reads in part as follows:

> ". . . . *Allotments shall be made* in such manner and in such amounts as to provide a fair, efficient, and equitable distribution of such quota or proration thereof, *by taking into consideration* the processings of sugar or liquid sugar from sugar beets or sugarcane to which proportionate shares, determined pursuant to the provisions of subsection (h) of section 302, pertained; the past marketings or importations of each such person; and the ability of such person to market or import that portion of such quota or proration thereof allotted to him . . ."

The Act requires "fair, efficient, and equitable" allotments of Puerto Rico's refined sugar quota. *But such allotments may be arrived at only "by taking into consideration" the three standards of proportionate shares, past marketings, and ability to market. Such allotments may not be arrived at by failing to take into consideration any of such standards, nor by taking into consideration some other standard.* It is not even sufficient for the Secretary to hide behind a claim that the allotments are fair, efficient, and equitable. He must have arrived at fair, efficient, and equitable allotments by taking into consideration the three standards and only those standards.

Like the constitutional question, the statutory question also has a monopoly aspect, but one distinct from that in the constitutional question. When the refined sugar limitation was first established in 1935 there were only two Puerto Rican refiners marketing refined sugar in the States. One was Porto Rican American and the other Guanica (South Porto Rico Sugar Co.). The first order of the Secretary allotting the refined sugar limitation (i. e., the order for 1935) gave Porto Rican American 118,217 tons, or 95.70% of the amount allotted, and Guanica 5,312 tons, or 4.30% (R. 154-158, 42). Roig and Western did not come into full-

scale operation as refiners until 1937 and 1938, respectively. During the years 1940 and 1942-1947, when the refined sugar limitation and allotments thereof were suspended or not in effect, Roig and Western made extensive inroads on this monopoly (R. 147). Now the Secretary proposes to restore, reinforce, and foster the monopoly, at least at its 1941 prewar level. This is done pursuant to a departmental policy which glosses over "monopoly" by the more felicitous phrasing of "restoration of prewar competitive relationships" The policy is not one of the three statutory standards and is without authority in law.

Congress did not intend the Act to preclude new entrants into the field of Puerto Rican refining. The two statutory standards of ability to market and proportionate shares confer a right to some allotment even in the absence of past marketings. Nevertheless, Porto Rican American regards the amount of the refined sugar limitation as its personal perquisite since it was based primarily on Porto Rican American's performance in 1933 and since Porto Rican American had a refinery and Roig and Western did not when the refined sugar limitation was first allotted in 1935. By implication Porto Rican American says that Roig and Western, having gone into the refining business after that date, should not reasonably expect to participate in the allotment of the refined sugar limitation at the expense of Porto Rican American's monopoly. In Order 18 the Secretary took the same position.

Order 18 purported to be based on two of the three statutory standards, namely, ability to market and past marketings. *We are of the view that the Order was actually based on a standard not found in the Act, namely, restoration of prewar competitive relationships.* To give effect to this illegal standard the Secretary erroneously construed and manipulated the three statutory standards so as to convert them into a single extra-legal standard of restoration of prewar competitive relationships and thereby restore and reinforce the monopoly of Porto Rican American among Puerto Rican refiners. That this result was achieved is

obvious from a comparison of the three Puerto Rican refiners' refined sugar entries into the States in 1941 with their Order 18 allotments for 1948:

Refiner	1941 Entries[1] (Tons)	1948 Allotments[2] (Tons)
Porto Rican American	79,237	79,258
Roig	15,028	16,698
Western	13,017	14,772

[1] R. 147.
[2] R. 175.

That restoration of prewar competitive relationships was "taken into consideration" is admitted in the record by the Department.

As early as June 10, 1947, the Director of the Sugar Branch wrote Arthur L. Quinn, attorney for Porto Rican American, that—

> ". . . *we believe that when* [war time] *controls are removed the various segments of the industry should, insofar as possible, occupy the same relative positions as they occupied prior to such controls. . . .*" (R. 158-9) emphasis and bracketed matter supplied)

The Department used Order 18 to place this belief into effect.

The proposed allotments in the Notice of Hearing were "worked out" by the Government Witness, Davis, "in conjunction with" the Director of the Sugar Branch (R. 26). The proposed allotments differed in only one minor respect from the final allotments in Order 18. The Government Witness is *the representative of the Department* designated by the Director of the Sugar Branch to testify on behalf of the Department at the hearing.[1] Davis was so designated (R. 149).

[1] Rules of Practice, § 801.27(b), 12 F. R. 8226, Dec. 9, 1947.

While the extra-statutory standard of restoration of prewar competitive relationships passed *sub silentio* in Order 18 itself, it was freely articulated by the Government Witness at the hearing. In explaining why the Department proposed to ignore marketings in the war and postwar years in measuring the statutory standards of past marketings and ability to market, he testified—

> "The wartime years are also considered undesirable because of the wartime policy of the Department to minimize interference with the prewar competitive relationships of industries." (R. 6)

and this testimony was twice repeated (R. 29, 31). Thus at one point Government counsel asked him (R. 29)—

> "Does the Department have any policy which you could state for the record, with respect to making allotments in a way that would not perpetuate this wartime pattern of competition between the companies?"

and the answer was—

> "As I mentioned on page 6 of my statement this morning, the wartime years were all so [sic] considered undesirable because of the wartime policy of the Department to minimize interference with the prewar competitive relationships of industry."

The Government Witness further stated that wartime restrictions changed the competitive positions of the parties interested in the hearing (R. 29) and that the entries of direct consumption sugar into the continental United States during the war and postwar years were completely out of line with competitive positions during the prewar years (R. 31-32). The contrast between the asserted bases of allotment in Order 18 and the Government Witness' testimony as to the basis is clear and sharp.

The record demonstrates that restoration of prewar competitive relationships is considered by the Department not only as a standard for allotments but as the primary

standard and the end to which the whole statutory machinery of making allotments is to be directed in this instance. The statutory standards of past marketings and ability to market are made to serve as cloaks for the standard actually used.

The situation is pointed up even more forcefully by the allotments made by the Department in April of 1947. The Puerto Rican refined sugar limitation of 126,033 tons was not in effect since quotas under the Sugar Act of 1937, including that limitation, had been suspended since 1942 by action of the President under § 509 of that Act. Notwithstanding, an equivalent of the limitation was reimposed in 1947 (but in the amount of 130,000 tons instead of 126,033 tons) through action of the Commodity Credit Corporation and was allotted among the Puerto Rican refiners by that corporation.

The situation arose in the following fashion: From 1944 to 1947 the Commodity Credit Corporation purchased from the raw mills in Puerto Rico the available supply of raw sugar in excess of local needs. In the three years 1944, 1945 and 1946, the Commodity Credit Corporation designated the amount of raw sugar the raw mills might release to Puerto Rican refiners for refining for consumption on the mainland (R. 32-34, 67). During those years there was in actuality no limitation. The approval of such releases was automatic on the part of the Commodity Credit Corporation and refiners were free to refine and ship to the mainland whatever amount of sugar they could in competition with each other acquire or purchase from affiliated or non-affiliated raw mills (R. 113-114).

However, in 1947 the Commodity Credit Corporation established 130,000 tons as the total amount of releases of Puerto Rican raw sugar to be refined locally for mainland consumption. The corporation then allotted that amount by assigning to each Puerto Rican refiner an amount of raw sugar that could be released to him by the raw sugar mills for refining for mainland consumption. The following

table taken from CCC Letter No. 41 To Puerto Rican Producers of Raw Cane Sugar, issued April 25, 1947, by James H. Marshall, Director and Contracting Officer, CCC (see Appendix IV to this brief), sets forth the allotments made:

"Name of Manufacturer of Direct Consumption Sugar	1946-47 Crop Direct Consumption Sugar (short tons, raw value)
Aguirre	11,154
San Francisco	1,378
Western Sugar Refining Company	29,965
Roig Refining Company	27,183
P. R. American Sugar Refining Co.	60,320
Total	130,000"

Later in the year Porto Rican American asked for, but was refused, a larger amount (R. 158-159).

James H. Marshall who, as Director and Contracting Officer, CCC, made the allotments for 1947 by CCC Letter No. 41 and regarded them as fair despite the effect of "abnormal wartime conditions", is the same official who as Director of the Sugar Branch, participated in "working out" the allotments in Order 18 (R. 26). If approximately 30,000 tons each were fair allotments for Roig and Western in 1947, and only 60,000 tons for Porto Rican American, then it is difficult to see how only approximately 15,000 tons each for Roig and Western and 80,000 tons for Porto Rican American becomes "fair, efficient, and equitable" in 1948.

The use of an extra-legal non-statutory standard such as "restoration of prewar competitive relationships" in making the allotments for 1948 in Order 18, renders that Order invalid. A decision by the United States Court of Appeals for the District of Columbia Circuit in another connection is directly in point. During most of the period when sugar quotas and allotment powers under the 1937 Act were suspended by the President, allocation of sugar was still authorized by § 301 of Title III, Second War Powers Act, 1942,

in such manner, upon such conditions, and to such extent as the President deemed necessary or appropriate in the public interest and to promote the national defense. Subsequently Congress limited this allocation power by a prohibition against allocations dependent upon the existence of a concern or its functioning in a given field of activity at a given time, that is, a prohibition against allocations upon an "historical basis." § 203(b), War Mobilization and Reconversion Act of 1944 (58 Stat. 787). Notwithstanding this limitation, the Secretary and other officials enforced allocations of sugar made on an historical basis. In *Fleming* v. *Moberly Milk Products Co.*,[1] the court enjoined the Secretary from using the historical basis standard since it was not authorized by law. By enforcing such unauthorized standard, the Secretary was attempting to preserve past competitive relationships just as in our case he is attempting to do so by freezing competitors to their 1941 allotments and restoring prewar competitive relationships.[2]

The two situations are legally the same. In each instance allocations were based on an unauthorized standard. In our case the standard is unauthorized by law since Congress has carefully specified in detail in the Sugar Act of 1948 the three standards to be used and has not included among them the standard of restoration of prewar competitive relationships. In the *Moberly* case the standard was unauthorized by law since Congress had laid down a broad general standard and then carved out from it the standard of historical basis and prohibited its use

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[1] 82 App. D. C. 16, 160 F. 2d 259 (Ct. App., Dist. Col., 1947), cert. dismissed, 331 U. S. 786 (1947).

[2] To the same effect, but dealing with allocations by the Secretary to grain distillers on the basis of an unauthorized standard, is *Publicker Industries, Inc.* v. *Anderson*, 68 F. Supp. 532 (D. C., Dist. Col., 1946).

B. Order 18 is based on an erroneous construction of the ability to market standard.

1. The Statutory Standard of Ability to Market Means Present, not Past, Ability.—As one of the standards to be used the Act states "ability of such person to market or import that portion of such quota or proration thereof allotted to him." In other words, and applied to the present case, the statutory standard is the allottee's relative ability to market for 1948 whatever portion of Puerto Rico's refined sugar limitation for 1948 is allotted to him. The standard is one of ability to market in the immediate future—during 1948—not ability to market in the past. The proper measure of ability in the immediate future is current, not past, ability. The allottee's marketings in past years—his historical basis—are not a part of ability to market but are dealt with in the Act by the separate and distinct standard designated "past marketings." We deny flatly the statement in the Secretary's brief (p. 41) that either respondents or the court below agree with the Secretary that *past* performance (rather than *current* performance) is a permissible measure of present ability.

In Order 18 the Secretary has measured ability to market by the highest single year's marketings during the period 1935 to 1947, inclusive. The result is that Porto Rican American's ability to market refined sugar in the States in 1948 is measured by its past marketings of such sugar in the States in 1935, San Francisco by 1936, Guanica by 1939, and Roig by 1940, while the ability of Aguirre and Western is measured by 1947. In 1935 (13 years earlier) Porto Rican American, by reason of its monopolistic position, marketed the largest amount of sugar it has ever marketed in the States, 116,611 tons (R. 147). For no recent year has it approached that amount. In 1947 it marketed 60,820 tons (R. 147). The mathematical effect of the Secretary's interpretation of the ability to market standard is greatly to increase the allotment of

Porto Rican American at the expense of allotments to the other allottees.

The only previous instances in which the Secretary has, following a contested hearing, made allotments of the Puerto Rican refined sugar limitation, were in 1938 and 1939. In both these determinations the Secretary used, in measuring ability to market, two factors—*present* plant capacity and *current* marketings.

In determining allotments for 1938 the Secretary did not even go back to the then relatively recent year of 1935 to measure the ability of any allottee to market in 1938. On the contrary, the Secretary in April 1938 measured such ability one-half by "present" refining capacity, for which he took 1937 actual performance, and one-half by "current" marketings, for which he took deliveries into the States between January 1 and March 22, 1938 (Puerto Rico Sugar Orders Nos. 10 and 11, 3 F. R. 925 and 1279).

Neither in determining allotments for 1939 did the Secretary measure ability to market by going back to 1935. On the contrary, he again took the most recent year. In January 1939 he measured such ability three-fourths by "present" refining capacity, for which he took actual 1938 performance, and one-fourth by "current" marketings, for which he took deliveries into the States between January 1 and October 24, 1938 (Puerto Rico Sugar Order No. 13, 4 F. R. 59). In each instance only the most recent data was regarded as pertinent and used in determining ability to market.

Assuming *arguendo* that present refining capacity, i. e., physical ability to process, is not a measure of ability to market,[1] this would, on the basis of the Secretary's prior

[1] Order 18 omits present refining capacity as any measure of ability to market on the ground that "actual performance is considered a better measure than plant capacity" and then proceeds to use a performance that was "actual" only in 1935 in the case of Porto Rican American. This ignoring of present refining capacity especially discriminates in favor of Porto Rican American and against Roig. From 1939 to 1947 Porto Rican American's refining

determinations, leave current marketings as the measure. However, Order 18 omits this also. For both present refining capacity and current marketings Order 18 substitutes marketings as far back as 1935.

If the Secretary was right in his 1938 and 1939 determinations that ability of the allottee to market his portion of the quota means present ability as measured by current factors, then the Secretary is wrong in Order 18. The standard of ability to market reads the same in both the 1937 Act and the 1948 Act. It is submitted that substitution of 1935, 1936, 1939 and 1940 ability of various allottees for present ability is directly contrary to law.

2. Porto Rican American's Ability to Market in the States Has Greatly Decreased Since 1935.—Porto Rican American's ability to market in the States has decreased since 1935 by reason of three factors: First, competition from Roig and Western in years when there were no allotments of the refined sugar limitation; second, Porto Rican American's lack of capacity to supply the local market in Puerto Rico save at the expense of its marketings in the States; and third, Porto Rican American's decreased ability to obtain raw sugar supplies from unaffiliated outside sources.

During the period from 1935 to date the amount of the refined sugar limitation has been allotted among Puerto Rican refiners only four times prior to Order 18. These allotments were for the years 1935, 1938, 1939, and 1941.[1]

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capacity, according to the Government Witness, has decreased from 207,195 tons to 196,920 tons, while Roig's has increased (almost doubled) from 60,201 tons to 110,556 tons. Over the same period Western's refining capacity increased from 66,396 tons to 68,367 tons (R. 28, 149).

[1] For 1935, Puerto Rico Sugar Order No. 3, issued Apr. 2, 1935; for 1938, Puerto Rico Sugar Order No. 9 (3 F. R. 779, Mar. 31, 1938), amended by Order No. 10 (3 F. R. 925, Apr. 20, 1938), and Order No. 11 (3 F. R. 1279, June 3, 1938), and Order No. 11, Supp. 1 (3 F. R. 2785, Nov. 29, 1938); for 1939, Puerto Rico Sugar Order No. 13 (4 F. R. 59, Jan. 6, 1939), but this order was terminated Sept. 11, 1939; and for 1941, Puerto Rico Sugar Order No. 16 (5 F. R. 4748, Dec. 3, 1940).

Roig did not commence full-scale refining operations until 1937 and Western until 1938.[1] Previous to that they were solely raw sugar producers. Roig and Western, not being in operation, of course received no allotment under the order for 1935 and received only small allotments under the orders for 1938, 1939, and 1941. During the four years in which the amount of the refined sugar limitation was allotted there could consequently be no substantial competition which would affect Porto Rican American's ability to market, and the attempt is now being made to hold Roig and Western to the level of the drastically restricted competition for those years. However, in the years, such as 1940 and 1942 to 1947, when the amount of the refined sugar limitation was not being allotted, Roig and Western were free to compete with Porto Rican American in the acquisition of raw sugar and in its refining and marketing. That competition greatly decreased Porto Rican American's ability to market in the States, as is shown by the actual marketing figures (R. 147).

Turning to the second factor—during the war and postwar years the local Puerto Rican market for refined sugar was, by reason of transportation differentials and government price controls (R. 49) more profitable for Puerto Rican refiners than the export market in the States. In consequence there was a great incentive for Puerto Rican refiners to market locally rather than in the States. Porto Rican American was able to do so only by decreasing its continental marketings below those of the prewar period.

Comparing 1941 with 1947, and using round figures, Porto Rican American's total production of refined sugar decreased from 90,000 tons to 84,000 tons. It increased its local marketings by 12,000 tons, but to do so had to decrease its marketing in the States by 18,000 tons. On

[1] R. 147. Roig produced a small amount of refined sugar the previous year, 1936, when getting under way, and Western produced small amounts of turbinado sugar the previous three years, 1935-1937.

the other hand, Roig increased its total marketings from 22,000 tons to 44,000 tons and was able to increase *both* its local marketings and its marketings in the States by 10,000 and 12,000 tons, respectively. Also Western increased its total marketings from 19,000 to 46,000 tons and *both* its marketings locally and in the States by 10,000 and 17,000 tons, respectively. Porto Rican American chose to eat its cake and increase its more profitable Puerto Rican sales. It now asks the Government to ignore their demonstrated adverse effect on its ability to market in the States, and the Secretary has acquiesced. Conversely, in 1948 when Porto Rican American desired to justify its illegally excessive allotment, it produced 95,931 tons of refined sugar. It filled its allotment but only by reducing its local deliveries to around 13,000 tons as against 23,000 tons for 1947 and 30,000 tons each for 1945 and 1946.[1] Roig and Western, but not Porto Rican American, have the ability to increase their marketings locally without at the same time reducing the tonnage of their marketings in the States.

As to the third factor, lack of raw supplies, resulting in a decrease of Porto Rican American's ability to market, the situation is as follows: Porto Rican American's supply of raw sugars from its affiliated raw sugar mill, Mercedita,[2] is at best only about sufficient to meet its requirements for shipment of refined sugar to the States and is always far from sufficient to meet its requirements for refined sugar for both the local and continental markets. Inability to obtain sufficient raw sugar from outside non-affiliated mills has lessened Porto Rican American's ability to market refined sugar in the States.

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[1] See Appendix III to this brief. The other figures on which the above statements are based will be found in the record at pp. 12, 25, and 147.

[2] Porto Rican American formerly had a second affiliated raw sugar mill, Boca Chica, but that was taken out of operation in 1947 (R. 85-87).

In 1935 Porto Rican American's supply of raws from affiliated mills was 48,922 tons, but its outside purchases were 68,753 tons (R. 87). In 1948 its supply of raws from its affiliated raw mill was 60,982 tons, and its outside purchases were 35,243 tons.[1] Raw supplies from its affiliated mill have increased around 12,000 tons but at the same time raw purchases from outside mills have decreased around 34,000 tons.

Roig's supplies of raws from its affiliated mills, Ejemplo and Roig, and Western's supplies of raws from its affiliated mill, Igualdad, are more than sufficient for Roig's and Western's refining requirements.[2]

In the face of these facts it is not surprising that Porto Rican American insists that its present ability to market in the States be measured by marketings at a time (1935) when that ability had not deteriorated because of competition and large local marketings and when it had available outside raw supplies in an amount of about twice what it now has.

The Secretary was forced to use 1935 past marketings as the measure of Porto Rican American's present ability to market, if he were to achieve his objective of restoration of prewar competitive relationships. In doing so he has erroneously construed the statutory standard of ability to market.

C. Order 18 is based on an erroneous construction of the past marketings standard.

As another of the standards to be used the Act states "past marketings . . . of each such person."

In *Gay Union Corporation* v. *Wallace*[3] the court said, in an opinion by Judge (now Chief Justice) Vinson, that—

> " . . . There is no merit in the contention that restricting consideration of past marketings to the pre-

[1] See Appendix III to this brief. [2] Id.

[3] 71 App. D. C. 382, 112 F. 2d 192, 198, 199 (Ct. App. D. C., 1940), cert. denied 310 U. S. 647 (1940).

ceding four years arbitrarily discriminated against those whose marketing experience antedated that period. . . .

" . . . If a period of past marketings so remote that it would bear no reasonable relation to the present marketing situation was selected, such a selection might effect an arbitrary discrimination that would fall before the Fifth Amendment. . . . "

In Order 18 the Secretary has selected such a "remote" period. Order 18 measures past marketings for each allottee by going back to an average of its marketings in the States during the best five years of the 7-year period 1935 to 1941 and skipping over and leaving out of consideration the 6-year period 1942 to 1947. No doubt marketings during 1935 to 1941 are past, but so are those during 1942 to 1947.

In *Gay Union Corporation* v. *Wallace*, the appellant claimed that 1939 allotments should be measured by marketings prior to 1929—more than 10 years previously. The court sustained the Secretary in his refusal so to apply the standard and approved his use instead of "the most recent few years," namely, the four years immediately preceding the allotments. In Order 18 the Secretary abandons this position and goes back from 7 to 13 years in measuring past marketings.

Again the choice made by the Secretary results in discrimination in favor of Porto Rican American and against Roig and Western. The 7-year period 1935 to 1941 includes all of Porto Rican American's five highest years. It includes only two of Roig's five highest years and only one of Western's five highest years. In the first three years of the 7-year period Western had only insignificant shipments of turbinado sugar (R. 147).

The only times previously that the Secretary has considered the standard of past marketings in connection with a contested hearing on allotment of the Puerto Rican refined sugar limitation, were in 1938 and 1939. Then he did

not skip over to remote years. Porto Rican American was refining as far back as 1926 (R. 36) but the Secretary did not skip over six years to the 7-year period 1926 to 1932. On the contrary, he began with the last past year and went back three and four years. In April 1938 he determined past marketings by using marketings during 1937, 1936, and 1935 (Puerto Rico Sugar Orders Nos. 10 and 11, 3 F. R. 925 and 1279). In January 1939 he determined past marketings by using marketings during 1938, 1937, 1936, and 1935 (Puerto Rico Sugar Order No. 13, 4 F. R. 59). In accordance with this prior adminstrative practice the court below in our case stated that "'Past marketings,' as that term is used in the Act, plainly includes marketings within the last half-dozen years or at least the more recent of them." (R. 196)

The years 1942 to 1947 were years when no allotments were in effect under the 1937 Act and competition was free from the restraints of that Act[1]. During 1942-1947 Porto Rican American's performance fell far short of its performance during 1935-1941. The average was 57,486 tons as against 100,070 (R. 147). The Secretary was forced to skip over the years 1942-1947 in measuring past marketings if he were to achieve his objective of restoration of prewar competitive relationships. In doing so he has erroneously construed the statutory standard of past marketings. Roig and Western do not contend that past marketings may be measured by marketings only during the years 1942 to 1947; in fact they suggested the use of the last ten years—1947 back through 1938 (R. 47, 120). They do contend, however, that marketings in the 1942-1947 period are past marketings and that the period used for measuring past marketings may not lawfully under the Act be arrived at by skipping over the years 1942-1947.

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[1] In 1947 there were allotments by the Commodity Credit Corporation pursuant to its raw sugar purchasing contracts. Porto Rican American's allotment was much lower and Roig's and Western's much higher than those set up in Order 18. See *supra*, pp. 49-50.

D. Order 18 is based on an erroneous construction of the statute in failing to give any weight to the proportionate shares standard.

As the third of the standards to be used the Act states "the processings of sugar . . . from . . . sugarcane to which proportionate shares, determined pursuant to the provisions of subsection (b) of section 302, pertained." The Secretary gave no weight to this statutory standard on the ground that its use was not mandatory (R. 171, 169).

The three statutory standards, proportionate shares, past marketings, and ability to market read in the *disjunctive* in the 1937 Act. In consequence, the court in *Gay Union Corp* v. *Wallace, supra,* stated that the Secretary in making allotments was not required to employ all three standards, but might make use of any one or more of them in his discretion. However, in the 1948 Act, Congress changed the language so as to read in the *conjunctive* and this was the only change made in the three standards. In consequence, it is clear that the Secretary is now required to take into consideration all three standards in making allotments and the court below so held in our case. In using 1935, 1936, 1939, and 1940 past marketings to measure ability to market, and failing to give any weight to proportionate shares, the Secretary has wound up with using only one of the three statutory standards, namely, past marketings, as to four of the six allottees.

A farm's proportionate share is its share of the sugarcane required to be processed to enable Puerto Rico to meet its quota (Act, § 302(a)). The statutory allotment standard of "processings of sugar . . . from . . . sugarcane to which proportionate shares . . . pertained" is a standard measured by the processings of *raw* sugar from such cane by the allottee. Only raw sugar is processed from cane; refined sugar is processed from raw sugar.

In applying such statutory allotment standard to an allottee of the Puerto Rican mainland sugar quota, credit is

given the allottee only for its processings of proportionate share cane into *raw* sugar. In applying the statutory allotment standard to an allottee of the refined sugar limitation on that quota, the statute provides for no different rule. The allottee is to receive credit with respect to its processings of proportionate share cane into *raw* sugar.

Porto Rican American's own supply of raw sugar is inadequate to meet its refining needs, while Roig's, Western's, and other allottees' own supplies are more than adequate (see *supra*, pp. 56-57). Failure to use the statutory standard of proportionate shares again discriminates in favor of Porto Rican American and against all other allottees. In failing to give any weight to the statutory standard of proportionate shares the Secretary has erroneously construed the statute. The claim that the Secretary did give consideration to the standard by giving it zero weight convinces one only of the dialectic skill of his counsel.

The Secretary also says that the standard of proportionate shares is inapplicable to allotments of the Puerto Rican refined sugar limitation because three of the allottees, Porto Rican American, Roig, and Western, do not themselves directly process raw sugar from sugarcane but do so through an affiliated raw mill,—that the two legal entities differ (R. 168-169). This is a distinction, without pertinence in the matter of allotments, between an enterprise that uses a single entity to operate both its raw mill and refinery (as in the case of Aguirre, Guanica, and San Francisco) and an enterprise that for sound business reasons uses separate but affiliated entities to operate its raw mill and refinery (as in the case of Porto Rican American, Roig and Western). As the court below said—

> "No doubt facts of this sort may be considered in determining how much weight should be given to processings of proportionate-shares sugar. In our opinion they cannot justify refusal to give this standard any weight at all." (R. 197)

Roig and Western at the hearing on the Government's proposal for allotments took the position that the Secretary should not ignore any factor required by the Act to be considered but that a smaller weight should be given to proportionate shares than to the other two statutory standards (R. 123, 49).

We submit that an allottee of the refined sugar limitation is entitled to credit under the proportionate shares allotment standard for all *raw sugar processed by it or its raw mill affiliate from proportionate share cane and used by it for refining.* This rule does no violence to the statute. It is simple to apply and recognizes the increased ability of an allottee to assure fulfillment of its allotment to the extent that the allottee, or its affiliate, processes raw sugar, and therefore unquestionably *pro tanto* controls an available supply and is not compelled to rely on the contingency of purchases of raw sugar from outside unaffiliated raw mills.

E. Abnormal wartime conditions do not validate erroneous constructions of the statutory allotment standards.

"Abnormal wartime conditions" was the excuse advanced by the Secretary for his failure to use current performance in measuring ability to market and for his skipping over and omitting 1942 to 1947 performance in measuring past marketings (R. 172, par. 4, and 173, par. 8). His counsel now attempt to bolster this excuse by adding "abnormal weather conditions" during the years 1942 to 1947, at the same time admitting that the "Secretary found it unnecessary to explore that factor" (Br. 27,31). The Secretary argues that the statute gives him discretion to select representative years for the purpose of measuring ability to market and past performance and therefore to ignore all or any of the years 1942 to 1947.[1] The statute says

[1] Nevertheless the Secretary in Order 18 considers one of the years during this period, namely, 1947, representative of Aguirre's and Western's ability to market.

"ability to market" and "past marketings", not "ability to market and past marketings during a representative period to be determined by the Secretary", or "ability to market and past marketings adjusted for wartime, weather, or other abnormalities." The Secretary is asking this Court for a broad discretion that Congress did not see fit to give him.[1]

The evidence shows that wartime restrictions and dislocations (i.e., blackouts, gasoline rationing, island transportation, shipping space, etc.) were equally applicable to all three Puerto Rican refiners. Such restrictions and dislocations were "difficulties" to Porto Rican American, to which it testified complainingly at length (R. 63-81, 94-102). To Roig and Western these same restrictions and dislocations were not difficulties since Roig and Western were able to solve and surmount them (R. 61-62, 139). Even Porto Rican American, despite its purported difficulties, was throughout the war period able to market, in the same year as produced, all its refined sugar produced for marketing in the States, save in one year when a small amount was carried over until February of the following year (R. 88-89). Actually Porto Rican American, despite its complaint as to its distance from the wartime shipping port of San Juan, is located nearer San Juan than is Western.

Porto Rican American finally claimed that the difficulties that made the war years unrepresentative were difficulties that "balled up" *production* rather than marketing (R. 91).

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[1] In the Sugar Act of 1934 (48 Stat. 670, 673) Congress authorized the Secretary to fix *raw* sugar quotas on the basis of average quantities brought into continental United States "during such three years, respectively, in the years 1926-1933, inclusive, as the Secretary of Agriculture may, from time to time, determine to be the most representative three years . . ." This Act did authorize the Secretary to determine a "representative" period in fixing the raw sugar quota for Puerto Rico. However, in the 1937 and 1948 Acts the three standards to be applied by the Secretary in allotting the refined sugar limitation for Puerto Rico are not coupled with an authorization for selection of a period that he deems to be "representative". Where Congress in sugar legislation has meant "representative" period it has said so.

Porto Rican American's real difficulties in supplying the States flowed, as heretofore set forth, from its local marketing policy and its competitive inability to purchase sufficient raws from unaffiliated mills. In no one year are marketing conditions precisely the same as in any other year. Admittedly during the war years many kinds of control were imposed on all of us. However, any realistic appraisal is bound to result in the conclusion that marketing conditions in 1948 were more nearly represented by those of the postwar years of 1946 and 1947 and even by those of the war years 1942-1945, than by marketing conditions during the prewar years, 1935-1941.[1]

"Abnormal wartime conditions" was a rationalization to excuse the failure to use any of the years 1942-1947 in measuring the standards of ability to market and past marketings to the end that the Secretary might manipulate the standards so as to produce the result of "restoration of prewar competitive relationships" and thereby reinforce Porto Rican American's prewar monopolistic position. "Abnormal wartime conditions" does not justify erroneous interpretation of the statutory standards.

CONCLUSION.

It is respectfully submitted that the judgment of the court below should be affirmed on the ground that § 207(b) of the Sugar Act of 1948 is unconstitutional, or if this Court

[1] The opinion evidence of the Government Witness (R. 14, 28, 31-32) is directly contrary to the opinion evidence of the Witness Requa, who regarded marketings during the war period as entirely appropriate yardsticks for allotment purposes for 1948 (R. 115-116).

rejects that conclusion, then on the ground that the Order fails to conform to the requirements of § 205(a) of the Act.

Respectfully submitted,

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APPENDIX I.

Reply to Refiners' Appendices Regarding Cane Growers Payments.

The mainland cane sugar refiners have compiled elaborate appendices to their brief purporting to show that from 1934 to 1948 Puerto Rico as a whole, and also Roig through an affiliate, benefited from the operation of the quota system by way of "quota premiums" and Government benefit payments (Br. Apps. B and C).

There are three things to be said about this line of argument: It is irrelevant and does not meet the question of the *power* of Congress over commerce between Puerto Rico and the States (see *supra*, p. 30) It misconceives the character of benefit payments. Finally, it suggests, by inference if not by direct statement, that no corresponding benefits accrued to the intervening mainland refiners themselves.

Government benefit payments.—Under the Sugar Acts benefit payments are in no case payable to any refiner or to any processor of raw sugar as such, but solely to *growers* of cane. Benefit payments thus accrued not to Central Roig Refining Company, but to Antonio Roig, Sucesores, S. en C., which is one of the large number of Puerto Rican growers of cane. Moreover, eligibility for such payments is conditioned by law on recipients' compliance with specific requirements determined by the Secretary of Agriculture with respect to farming practices, minimum wages required to be paid agricultural labor, and (in the case of the 29 or so growers, like Sucesores, who are also raw sugar processors) minimum prices required to be paid independent growers for their cane (Act, § 301). All these conditions increase the recipients' cost of production.

Benefit payments under the Sugar Acts are not subsidies, but compensatory payments reimbursing the grower

for loss in income sustained through imposition of the processing tax on sugar. Processing taxes payable to the Federal Treasury on Puerto Rican sugar from 1934 to 1948 amounted to approximately $127,000,000. By the mainland refiners' own figures, benefit payments during said period totaled $146,000,000 (Br. App. C, col. 11). The Government's own position has been that such payments are in the nature of a refunding of a part of the price previously withheld from the cane grower or raw sugar producer through imposition and collection of the processing tax.[1]

"*Quota premiums.*"—The unit "quota premiums" set forth in the intervening mainland refiners' brief (Apps. B and C) represents the average annual difference between the world price on which Cuban producers would have sold had there been no quotas, and the New York price ex-duty on which they did sell. This difference accrued, for instance, to Cuban producers marketing in the United States precisely in the same degree as it did to domestic producers. By statistical procedure similar to that used by the intervening mainland refiners (Br. Apps. B and C) it can be shown that the intervenor, American Sugar Refining Company, through its wholly-owned subsidiary Central Cunagua, Inc.,

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[1] Numerous authorities have recognized that the burden of sugar processing taxes rests on the growers of cane and processors of raw sugar. For instance, in analyzing the incidence of the processing tax on sugar, the Bureau of Agricultural Economics, in a detailed study published by the Bureau of Internal Revenue in 1937, stated that:

> "It has been shown that consumers did not pay any more for sugar as a result of the imposition of the processing tax, and that distributors and refiners of cane sugar did not absorb the tax. It follows, therefore, that the burden of the tax on cane sugar was borne by the manufacturer of raw sugar or by the grower of sugarcane, or was divided between them . . ." U. S. Treasury Department, Bureau of Internal Revenue, An Analysis of the Effects of the Processing Taxes Levied under the Agricultural Adjustment Act, 70, prepared by the Bureau of Agricultural Economics, U. S. D. A.

received "quota premiums" during the years 1934-1948 in the approximate amount of $10,800,000. In like manner, it can be shown that United Fruit Company, parent company and sole owner of intervenor, Revere Sugar Refinery, received "quota premiums" for the years 1934 to 1948 in the approximate amount of $13,200,000. Both amounts are, of course, many times larger than the amount of "quota premiums" received by Roig's affiliate, Sucesores.

Thus, to the extent that the mainland cane sugar refiners owned or controlled, or were otherwise affiliated with, producing properties, they obtained benefits commensurate with those received by Roig's affiliated raw sugar enterprise.[1]

Further benefits accruing to mainland cane sugar refiners as a group flow from the *raw* sugar quota limitation placed upon a competing source of refined sugar,—the domestic beet sugar area.

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[1] Entirely apart from the above, the intervening mainland refiners' argument would appear to be somewhat disingenuous in the face of the Government benefit payments and "quota premiums" which they themselves receive through affiliated enterprises. Thus, intervenors, Godchaux Sugars, Inc., received $1,234,000 solely from Government benefit payments during the years 1937 to 1948. (U. S. D. A. Press Releases: Mainland Cane Sugar Payments of $10,000 or Over Made Public, issued March 14, 1939; Sugar Division Makes Public Sugar Payments of $10,000 and Over, issued July 13, 1940; and Sugar Payments of $10,000 and Over Announced, issued July 9, 1941; telegram from Executive Office, Louisiana State P. M. A. Office, U. S. D. A., September 30, 1949.

In addition, of course, Godchaux also received "quota premiums" on sugar produced from their own cane.

APPENDIX II.

Extracts from Congressional Debates on Section 207 of the Sugar Act of 1937.

There is set forth in this Appendix brief extracts from Congressional debates on section 207 of the Act at the time of the original enactment of the Sugar Act of 1937 and of certain of its subsequent extensions.

At the time of original enactment the debate in the House centered around the amendment of Chairman Jones of the House Committee on Agriculture, supported by the Administration, to strike out the limitations on refining in Puerto Rico and Hawaii. The Jones amendment was defeated.

At the time of the extension in 1940 the debate in the House centered around the McCormack amendment, opposed by the Administration, to insert in the extension Act the limitations on refining in Puerto Rico and Hawaii. The McCormack amendment was adopted.

A. Extracts from Debates on Section 207 When Originally Enacted.

Representative Treadway of Massachusetts (81 Cong. Rec. 8300, 8301):

" . . . As I understand the measure before us today, and I have not studied it in detail, it will permit a better chance for the sugar refineries being able to take the raw sugar and refining it here.

. . . .

"There are a number of refineries scattered throughout the country and I am sure I am voicing the sentiment of the employees of those factories when I say we are heartily in favor of the opportunity this bill will give to show some slight favor for the sugar-refining industry of the United States."

Representative Pierce of Oregon (81 Cong. Rec. 8311):

"Mr. Chairman, I believe that we must take care of our own people in the continental United States . . These sections . . . are in the interests of the sugar refiners of the United States. I prefer to leave those sections in the bill, because they affect men working in factories. These are our own people; they are spending

their own hard-earned money, buying our own farm products, articles of food that we have to sell. I believe in protecting them."

Representative Green of Florida (81 Cong. Rec. 8445):

". . . I owe far greater allegiance and far greater support to the cane growers in the Everglades, to the cane growers in Louisiana, and to the beet-sugar growers in Colorado, than I do to foreigners . . ."

Representative Kleberg of Texas (81 Cong. Rec. 8302):

". . . For my part, Mr. Speaker, . . . I have no refiners in my district, but I yield to no man in my determination not to depart from the fundamental principles which rise in the first instance from the first law of nature—self-preservation."

Representative Lanzetta of New York (81 Cong. Rec. 8301):

". . . This bill, . . . sets up trade barriers against the American Territory of Puerto Rico. . .

"There are two phases to this bill—one agricultural wherein raw sugar quotas are allotted to the various producing areas in the United States and some foreign countries, and the other industrial, wherein limitations are put upon Hawaii, Puerto Rico, and the Virgin Islands as to the amount of direct consumption or refined sugar which they can produce.

"Puerto Rico has no quarrel whatsoever with the quota which it is given under this bill insofar as raw cane sugar is concerned. . . . They contend that if no limitation is placed in this bill on the direct consumption or refined sugar manufactured in continental United States, that there should be no restriction placed on the manufacture of direct consumption or refined sugar in Puerto Rico. There can be no doubt but what this unwarranted limitation on the American citizens of Puerto Rico is purely and simply a discrimination against American citizens who reside in that island. . .

". . . If we now restrict the manufacture of direct consumption or refined sugar, the distillers may well feel that they too are entitled to a restriction upon the manufacture of rum. Again, if we set this dangerous precedent, is it not possible that tomorrow a bill controlling the production of tobacco might contain a similar provision restricting Puerto Rico as to the amount of cigars, cigarettes, and smoking tobacco it may manufacture and send to the United States? . . .

"As far as I know, there is nothing in the Constitution of the United States which says that there are two kinds of citizenship—one for continental United States and one for those who reside in the offshore areas. Since there is no distinction in American citizenship, why should the citizens who reside in Puerto Rico be asked to bear greater burdens than the citizens who reside in continental United States?"

Representative Harlan of Ohio (81 Cong. Rec. 8305, 8447):

"In my own State of Ohio, for example, the Frigidaire Corporation a few years ago manufactured more electric refrigerators than all the rest of them put together. Now, suppose we had then established an industrial quota and said, 'We are going to freeze the industry here'; it would have almost raised a rebellion in this country. It would have been a throttle on the throat of progress. That is what we are doing here . . .

"There are two manners in which governments have always operated colonies. One is the Roman system of exploitation, making the colonies serve to the profit of the mother country. The other is the policy generally adopted following our American Revolution, of building up the prosperity of colonies along with the prosperity of the mother country. There was some justification for England and Rome and the other ancient exploiting countries to adopt their policy of exploitation, because they conquered their colonies. They were subjected alien enemy races, but in this case of Hawaii we have a people over there who voluntarily came under our flag, just as the people of Ohio came, and asked for admission into this Union. Now, we, this great United States, come and treat them far worse than we do the people in any other foreign country except Cuba. . .

"If we adopt this bill we will reverse our entire history of colonial policy, our conception of justice from our pre-Revolutionary days; we will make our foreign-trade agreement policy a mockery; we will give the Sugar Trust one more opportunity to exploit our people; and we will repay the patriotic support given us by the people of Hawaii with base ingratitude. . .

"What a farce is this plea 'to defend American labor.' The sugar industry pays less for labor out of its gross expenditures than almost any other industry in this country. So far as I know, it is absolutely the lowest. Three percent of its expenditures go for pay rolls, and, of course, it is because of that 3 percent that the sugar interests have flooded our hallways, and the dining room downstairs with lobbyists. But last week, when one walked into the congressional dining room, he did not know whether he was in a Congress of lobbyists or in a meeting place for lawmakers. Oh, yes; they are interested in the 3 percent; they are not all interested in the other 97 percent of their expenditures. They are not at all hoggish in this matter, either. Under the Jones-Costigan Act, the coastal refineries increased their annual refined-sugar output by 386,000 tons. They are not satisfied with that. Like the dog with the bone crossing the bridge, who sees the reflection of another dog in the river, they want it all. They do not want Hawaii or any of our possessions to cut in on their 97 percent at all."

Representative Maverick of Texas (81 Cong. Rec. 8328-29, 8448):

"I have made three points: First, that the quotas of refined sugar set up trade barriers, as against another part of the country, and which we cannot do within the United States of America; second, to do so is to relegate these parts of the United States to the rank of colonies and put a discriminating tax, burden, duty, or tariff upon them; third, to deny them the equal protection of the laws. . .

". . . this is parallel to what happened some 175 years ago in the British House of Lords. Is the spirit of Lord North walking through our Chamber today? In the House of Lords they were discussing then, and up to the time of our Revolution, the matter of commercial restrictions on the Colonies. They placed those restrictions on the Colonies; and England got the Revolution and lost the greatest lands on the face of the earth.

"What was the point at issue then?

"The point at issue was that the Colonies could grow all the raw products they wanted, but could not manufacture anything, that they had to buy their manufactured goods from England, and could not manufacture anything themselves. When Burke made his speech for conciliation of the American Colonies, everybody booed in the good English fashion of the time and laughed at him. . .

"What is the situation today? Why, it is exactly the same."

Senator Copeland of New York (81 Cong. Rec. 8824, 8825):

"Mr. President, one would not think to read this bill that Puerto Rico had any relationship to the United States. Our Government does not understand the first principles of colonial or insular administration. It is a misfortune to any territory outside the continental United States to be annexed to our country. If I needed any proof of it, I would not require more than this particular bill.

". . . But the pending sugar bill seeks to set apart and to treat differently the offshore areas of the United States as against continental United States.

"I say again that it is outrageous to treat the people of Puerto Rico as is to be done by the terms of the bill. . ."

Representative Wadsworth of New York (81 Cong. Rec. 8318, 8446, 8447):

"Am I stretching the gentleman's theory a little too far if I suggest that upon his theory the gentleman might be called upon some day to support a measure which would place a quota upon the production of cotton goods in South Carolina? . . .

". . . There is no restriction placed upon the refining of sugar by a continental refiner. He may purchase all the raw sugar he can purchase under the maximum quotas, and may refine 100 percent

of it. In the same breath we propose to say to the refiner in Hawaii, 'No; you cannot refine more than 3 percent of the raw sugar permitted to be produced in Hawaii.' There is your discrimination.

"Surely the gentleman from Texas would not advance that suggestion as a defense of the pending provision. We know that the home consumption of Hawaii, of necessity, must be infinitesimal compared with its total production of raw sugar, and it would hardly satisfy the Hawaiian to say to him, 'You can eat all the sugar you raise.' . . .

" . . . The gentleman from Texas reminds me that at present there is no refinery in the Virgin Islands. This bill proposes to say to the people inhabiting that possession of ours, 'You shall never have one.'"

Representative Lord of New York (81 Cong. Rec. 8310):

" . . . We have cut down somewhat the allowance from Puerto Rico. In addition to that we are providing that they can only ship into the country sugar in its raw form. They are a part of the United States, and, as others have contended here today, they should be allowed to ship refined if they please. If we should say that California must ship all of their sugar to New York City to have it refined, we would think that was rather drastic legislation. If we would say that Florida must ship all their sugar to Michigan to have it refined, we would think that was drastic legislation. That is exactly what we are doing with Hawaii and Puerto Rico."

Representative Scrugham of Nevada (81 Cong. Rec. 8315):

" . . . If we leave in this bill the provision which prohibits Hawaii and Puerto Rico from refining the sugar they grow, we will have established as a permanent part of our legislative policy the principle that we can by law favor one part of our country at the expense of another."

Representative Dockweiler of California (81 Cong. Rec. 8338):

"Mr. Chairman, there is an attempt in this bill to treat the Hawaiian Islands as if they were a colony. We operate under a Constitution, as is known by all, which is a constricted document. We cannot hope under a constitutional form of government to discriminate against our possessions."

Delegate King of Hawaii (81 Cong. Rec. 8302, 8303, 8334):

"I have consistently fought for the principle of equal treatment for Hawaii, as an integral and inseparable part of the United States. No other issue is involved. This bill does not provide for that equality of treatment in one of its provisions, that places upon Hawaii a special restriction as to refined sugar, which is not put upon the sugar-producing areas of the mainland. . . .

"The issue transcends the pending legislation. If a constituent part of the United States, over which the American flag flies, in which American industry has its being and American citizens live and earn their livelihood, can be legislated against in favor of another section, simply because it happens to be a Territory and geographically separated from the North American Continent, then indeed are the guaranties of the Constitution denied, the promises of American Democracy repudiated, the monopoly of industrial processes maintained, and a policy of colonial exploitation substituted for that of equal justice under law that has been America's proud boast.

"No such legislation was proposed to prevent the South from manufacturing its own cotton, nor to restrict the refining of oil in Texas in favor of other long-established oil refineries; nor would this Congress tolerate the proposed legislation if Hawaii were carved out of the mainland instead of being some 2,000 miles offshore.

"I ask this body to remember the fundamentals of our democracy, to think back to the time when this very type of colonial exploitation was practiced against America by Great Britain, and to accord Hawaii and the American citizens of that Territory, in equity and fairness, the right that should be open to every American to pursue their economic development within the allotted quota without a restriction that legalizes an existing industrial monopoly. . . .

" . . . I leave it to you that there is a fundamental difference between laying a quota restriction on an industry and in saying that of the quota you produce you may process only a small percent, in this case only 3 percent. No mainland producing area is barred from refining its entire quota allotment. . . . Hawaii is allowed a quota of 938,000 tons, a substantial reduction, to share with other producing areas in providing for an increased quota for the Louisiana and Florida area. Then we are told that we can process only 3 percent of that allowed quota."

Representative DeRouen of Louisiana (81 Cong. Rec. 8334):

" . . . The refining of sugar in continental United States is quite an industry and employs many; the investments are large and we believe that no offshore sugar should come to United States in consumption form; that this particular business should be given to our investors who have the equipment to do the work and the laborers who need the work. . . ."

Representative McCormack of Massachusetts (81 Cong. Rec. 8437, 8438, 8439):

" . . . I am going to ask Members from other sections of the country to remember that we from the industrial East have helped

them in many a close fought battle in this House. Only the other day the Gila Dam was up, and if you will look over the roll call you will find that the Members from the industrial East helped the West in that fight. . . .

"Now, an attempt is being made to divide the farmer and the worker of the industrial area in their common interests in this bill. . .

" . . . The only ones who will suffer if this amendment is adopted will be the refineries, through the destruction of their capital investment, and through the throwing out of work of thousands of citizens of the continental United States."

Representative Cummings of Colorado (81 Cong. Rec. 8308):

". . . I speak for the beet growers. . . . The only brief I have for the refiners is not for the refiners as such but I think that any good American citizen has a brief for every man who has a job in the United States. . . ."

Representative Woodruff of Michigan (81 Cong. Rec. 8322):

". . . The amendment which will be offered by the gentleman from Texas (Mr. Jones) would, in the final analysis if adopted and enacted into law, result in the ultimate destruction of that investment and throw out of employment those 14,000 men of whom I speak. . . ."

Representative Hope of Kansas (81 Cong. Rec. 8319, 8439):

" . . . If Hawaii and Puerto Rico were permitted to import into this country in a refined state all the quota they are given under this bill, they would bring in 1,736,000 tons of refined sugar. . . . in terms of labor this could not possibly mean the displacement of more than three or four thousand of the employees who are engaged in this industry today. This is the size of the labor problem involved.

"There is no industry in this country in which a smaller proportion of the volume of business goes to labor than the business of sugar refining. . . . So there is no industry in this country where the item of labor is of any less consequence than it is in the matter of sugar refining. . . .

" . . . Now, let us proceed to a discussion of the question as to whether tropical refining is cheaper than refining on the mainland. The facts that have been brought out at various hearings before the Tariff Commission very clearly show that the cost of refining in the Tropics is just as high as it is in this country. . . .

" . . . the Commission found that the cost of refining in the Tropics, particularly in Cuba—and it is substantially the same in Hawaii and Puerto Rico—is practically the same as in this country. . . . here is what the Tariff Commission found, . . .

> . . . the difference between domestic and foreign costs of refining is not such as to justify the Commission in specifying either an increase or a decrease in the rate of duty on refined sugar, or at least until after the Commission has finished the complete sugar investigation. . . .

"The refiners were not satisfied with that decision, and in 1934 they again brought the matter up before the Tariff Commission operating under this administration, and asked for an increase in the rate on refined sugar. The Tariff Commission at that time held and reported to the President on January 22, 1934, that no change was warranted in the tariff differential as between raw and refined sugar. . . .

"The issue involved, is not the issue of protection for the domestic producer of cane and beets, because, as I pointed out yesterday, the refiners who are opposing this amendment have for 40 years done everything they could to destroy the domestic beet-producing industry in this country. I cannot understand why those who are speaking for the domestic beet sugar industry should allow themselves to be made the tools of the refiners as is the case today. . . .

"I am suspicious of death-bed repentances. All these refiners are doing is hitch-hiking on a bill for the relief of the domestic producing industry.

" . . . That is the big, vital issue that is before the House today. It is a question as to whether we are going to treat our citizens in Hawaii and Puerto Rico just the same as we treat the citizens of Massachusetts and Kansas.

"Mr. Chairman, I think it is a rather healthy thing in this country to have a little competition in the cane-sugar refining business. All the competition we have in that industry today comes from the small amount of sugar that is refined in Puerto Rico, Hawaii, and what we permit to come in under this bill from Cuba and the Philippines. Is it not about time that these 13 great sugar companies which comprise the Sugar Institute, and which refine approximately 66 percent of all the sugar refined in this country, have a little competition? That is the reason these refiners are fighting this amendment today. They are monopolists at heart. They always have been, and they want to continue to be a monopoly."

Commissioner Iglesias of Puerto Rico (81 Cong. Rec. 8317):

"May I say to my brothers in the great American Federation of Labor that this bill, it seems to me, has nothing to do with the relations between capital and labor. . . .

" . . May I say to the Members of the House that Puerto Rico spends over two-thirds of the money it receives from this industry in the United States. . . .

"As a part of my remarks, I would like to incorporate two letters, as follows:

"'American Federation of Labor
Washington, D. C., July 13, 1937.

"'Hon. Santiago Iglesias,
House of Representatives, Washington, D. C.

"'Dear Mr. Iglesias: I will be pleased to speak to Marvin Jones and put in a good word for Puerto Rico relating to the importation of refined sugar into the United States and Puerto Rico, as you suggested in your letter dated June 25.

"'It has ever been our purpose and desire to help and assist Puerto Rico and the Puerto Rican people. I can clearly distinguish the difference between the treatment which should be accorded the people of Puerto Rico in favor of them and against Cuba and other countries not a part of the United States Government.

"'Be assured that I will do all I can to be helpful.

"'Sincerely yours,

"'William Green
President, American Federation of Labor.

"'San Juan, P. R., August 1, 1937.

"'Hon. Santiago Iglesias,
Resident Commissioner, Puerto Rico, Washington, D. C.

"'Dear Mr. Commissioner: The American Legion, Department of Puerto Rico, representing 18,000 World War veterans, are definitely opposed to the discriminations contained in H. R. 7667, which so materially affects the economic condition of 1,800,000 American citizens in Puero Rico.

"'This discrimination is in complete violation of all American policies toward the people of Puerto Rico and is against all basic American principles.

"'We sincerely hope such discriminations as this will be eliminated from all legislation affecting the people of Puerto Rico.

"'Very truly yours,

"'Juan Lastra Charriez,
Department Commander, the American Legion.'"

Representative Jones of Texas (Member in charge of bill, 81 Cong. Rec. 8306, 8433, 8434):

"The departments and the administration are very much opposed to any limitation, taking the position that there should be like treatment among all groups of American citizens, and that there should be no discrimination against any group of citizens anywhere under the American flag. . . .

". . . I think it is but fair for me to read to the House a very brief statement prepared at my request by some of those who have had the responsibility of administering the various features of the Jones-Costigan Act, setting forth their position in the matter. . . .

"'The first three parsigraphs of section 207 of H. R. 7667 discriminate against Puerto Rico, Hawaii, and the Virgin Islands by limiting refining operations in these areas without corresponding restrictions on the other domestic areas of the United States. These provisions are demanded by the seaboard refiners of the mainland in order to limit the amount of competition in the sale of refined sugar . . .

"'The question at issue is not whether the 14 mainland cane-refining companies, employing approximately 14,000 people, should be protected but whether, after having been granted the foregoing unusual forms of protection against competition in the bill, they should be given this additional protection, which is an outright discrimination against American citizens residing in the Territories and possessions of the United States.

"'The provisions discriminating against Hawaii, Puerto Rico, and the Virgin Islands in the matter of refined sugar are in complete violation of traditional American policy and of basic American principles.

"'First. These discriminatory provisions establish trade barriers within the United States. These provisions established that a certain part of the Union may not manufacture, may not process, the products of its soil. This discrimination against one part of the Union is established not merely in favor of another part of the Union—in itself an unjustifiable performance. It establishes discriminations against parts of America, inhabited by American citizens, in favor of a few mainland companies already highly privileged by this legislation. As a precedent this kind of discrimination is unthinkable—and because it was introduced without the administration's approval 3 years ago in the Jones-Costigan bill, in an emergency, is no reason for making it continuing national policy. . .

"'Second, these discriminations are contrary to the spirit of American institutions. They are contrary to contemporary American policy by establishing an Old World colonialism in America. The essence of Old World colonialism, the colonialism against which the Thirteen Colonies rebelled when they declared their independence from Great Britain, and against which the Spanish colonies rebelled when they broke away from Spain, was the right of the mother country to exploit those colonies, to consider their citizens as occupying a secondary and inferior status and to place economic obstacles in their path, in favor of commercial interests in the mother country. This is still the practice among Old World empires, though to a more limited extent than it was a century and a half ago—because colonies cannot be exploited as ruthlessly now as then. However, it is self-evident that sound statesmanship in the

United States cannot recognize, cannot permit, the establishment of such a continuing policy with us. It has been part of our historic process that territories represented an earlier stage of political development, and that during that period of development their lack of voting strength in the Congress was not to be taken advantage of to penalize them, but on the contrary should entitle them to the fullest protection from the entire Congress. Because Hawaii and Puerto Rico have no vote in the Congress is not only not a reason for discrimination against their products and imposing restrictions upon them against which they cannot retaliate, but it is a valid reason for insuring them protection at the hands of the entire Congress. The Congress itself is looked to by American citizens in Hawaii, Puerto Rico, and the Virgin Islands to insure them equal treatment."

B. Extracts from Debates on Section 207 When Extended in 1940.

Senator King of Utah (86 Cong. Rec., 13204):

". . . The discrimination . . . is found in the provisions of the bill which deny to Puerto Rico and to Hawaii the right to refine sugar produced in their respective territories. I have never been able to perceive the reason why the sugar producers of these territories should not be permitted to refine the raw sugar produced in their respective areas. The reason for the discrimination grows out of the fact that there is a powerful sugar organization or trust in continental United States, which is opposed and still opposes the producers of sugar in the territories referred to, refining their own sugar. The organization referred to has insisted that the raw sugar produced in Hawaii be transported to the mainland, there to be refined; and that the raw sugar produced in Puerto Rico be shipped to the Atlantic seaboard, there to be refined by the large sugar-refining units.

"I believe this to be unfair; the people of Puerto Rico are encountering many economic and industrial difficulties; there are hundreds of thousands of people without employment, and the National Government is required to make important contributions to aid the unemployment situation. Several thousand persons could find employment in Puerto Rico if the producers of sugar were permitted to have their product refined in Puerto Rico. The people of Puerto Rico are under the flag; they are entitled to the rights of American citizens, and it is, in my opinion, a grave injustice to deny them the right to refine the sugar produced in their own home territory."

Delegate King of Hawaii (86 Cong. Rec. 8724, 8725):

"I want to answer the gentleman's question by saying that the whole basis of the refiners' argument is that they must have . . . all sources of raw supply, and then they will sell it in the American market in competition with American sugar. . . .

" . . . Would this Congress have passed a bill limiting the industrial development of Oklahoma, New Mexico, or Arizona when they were incorporated Territories? When we came under the American flag and were incorporated as a Territory those three States were still Territories. Twenty-nine of the sovereign States have been incorporated Territories at one time or another. I doubt if any of them ever had a restrictive law passed on their manufactured products or industrial development that singled them out and made it a special rule for the Territory and not equally applicable to the several States of the Union. . . .

"Unfortunately as time has gone on, because the other 29 Territories have come in as States, today we find there is new language in American history. They are now 'insular possessions,' 'offshore areas,' 'noncontiguous areas,' 'a tropical country,' as if there was any difference between an American whether he lived in Hawaii or Alaska or California or any other part of the United States. . . ."

Representative O'Connor of Montana (86 Cong. Rec., 8745):

" . . . I deeply sympathize with the people in Puerto Rico and in Hawaii in regard to unemployment, but I also sympathize more deeply with about nine or ten million unemployed people in this country, and if it comes to a question of taking care of somebody in Puerto Rico or Hawaii or taking care of somebody in Utah or Montana or Colorado, I am in favor of giving the work to the American laborer, and taking care of the unemployed in our offshore possessions, because it won't cost so much. I am going to support the McCormack amendment because I think the American market for labor should be reserved for the American laborer."

Representative D'Alesandro of Maryland (86 Cong. Rec. 8752):

"It is for all of these reasons that labor and capital in the home refining industry in Maryland and other States would rather see a termination of the quota-subsidy system than a continuation of that system under terms which would further depress the refining industry.

"The quotas on Hawaiian and Puerto Rican refined sugar should be restored. I am in favor of the McCormack amendment because it keeps thousands of employees in the city of Baltimore and throughout the United States in their jobs."

Representative Hope of Kansas (86 Cong. Rec. 8740):

"There has been a great deal of camouflage in connection with the debate upon this measure. This amendment is spoken of as something designed to benefit labor. As a matter of fact, there are about 14,000 people employed in the refining of cane sugar in the United States; 14,000 people out of some 30,000,000 people gainfully employed in this country."

Representative Mansfield of Texas (86 Cong. Rec. 8746, 8747):

"Mr. Chairman, I represent a district that has a sugar refinery in it, which refines approximately 250,000 tons a year . . .

"Hawaii and Puerto Rico did not refine raw sugar for the mainland market before 1925, and no one can contend that the expansion of refined sugar in Hawaii and Puerto Rico is going to bring any noticeable increase in the income and general welfare of the people of those islands. Their livelihood is primarily dependent on raw sugar, not on refined. . . .

"The home refiners are limited because they are prohibited by law from purchasing sugar except in those quantities and from those sources specified in the act. Hawaii and Puerto Rico are two of the most important sources of the supply of raw sugar. It is obvious to me that if the tropical sugar industry is permitted to withhold its raw sugar for refining, then the home refiners will be deprived of an essential source of their raw material."

Commissioner Pagán of Puerto Rico (86 Cong. Rec. 8736, 8737):

"Some of the eastern seaboard refiners, in an effort to enforce discrimination against the island, have sought to convey the impression that the refiners in Puerto Rico received special consideration from the Government under the sugar program, because it so happens that some of the refiners may grow sugarcane and obtain Government refund payments under the Sugar Act. Since the refund payment to sugar producers is made through the Government, this payment is sometimes considered similar to Government subsidy payments which have been made on other agricultural products and the subsidies obtained through tariff protection. The payment made to sugar producers is simply a refund of the taxes collected on the sugar they produce, and refunded to the grower on condition that they limit production, pay wage rates as determined by the Secretary of Agriculture, eliminate child labor, and follow certain practices designed to maintain soil fertility. If the grower carries out these regulations, all of which add to his cost, he gets back the tax that he pays to sell his sugar, except that if he is a large grower he does not get back the full amount of the tax. . . .

"Puerto Rico benefits by the tariff system, as do all other domestic sugar-producing areas. The island has never sought to deny this,

but does want it definitely understood that the refund payment in no way is connected with the tariff.

"Moreover, whatever the benefits from the tariff are, the eastern seaboard refining industry has received proportionately as much subsidy as any branch of the sugar industry. For example, in the sugar hearings in 1937, Dr. Joshua Bernhardt, Chief of the Sugar Section, in testifying before the Senate Committee on Finance, points out clearly that the refiners received a subsidy on an average of $36,934,980 per year for the 3 years 1934, 1935, and 1936. On this basis the refiners have received a subsidy from the tariff since the sugar-controlled program went into effect—1934 to 1939, inclusive—of $221,609,000, while all refund payments made to the entire island of Puerto Rico under the Sugar Act totaled only $32,831,227. Thus, to claim or insinuate that the 14 continental refiners have not received a subsidy under the tariff is simply sidestepping the facts.

"Moreover, an average subsidy of $36,934,000 per year is equal to a subsidy of about $2,500 for each person employed by the refiners, as against an average annual wage per employee of only $1,005, according to the last census. But, never satisfied, the refiners are seeking to obtain further protection in the form of a trade barrier against Hawaii and Puerto Rico.

"Not only do the eastern seaboard refiners enjoy a full measure of subsidies, but the quota system also protects the seaboard refiners in the extraordinary form of an embargo upon shipments of refined sugar to the United States, in excess of a stated quantity, from the principal competing foreign country, which is limited under present legislation to a quota for direct-consumption sugars of 22 percent of the sugar quota. And the refiners also have protection from importations of direct consumption sugars from the Philippines under the provisions of the Philippine Independence Act. They have been given protection by quotas against increased importation of liquid sugars, which in some areas and in some industries has tended to replace ordinary commercial refiners' sugar."

C. Extracts from Debates on Section 207 When Extended in 1941.

Commissioner Pagán of Puerto Rico (87 Cong. Rec. 9284):

"The refined issue narrows itself down to whether or not the eastern seaboard refiners have the right to say who shall and who shall not refine raw sugar. In other words, it raises the question not only of discrimination and injustice to Puerto Rico and Hawaii but it raises the question as to whether or not it is for the best interest of the consuming public to turn over to the 17 refiners on the continent a practical monopoly of the sugar-refining business.

In this connection, in a letter dated August 7, 1937, addressed to Hon. Pat Harrison, United States Senate, Secretary of State Cordell Hull said:

> "'It is believed to be against the public interest for the Government to grant any further measure of protection to a group whose record repeatedly indicated it would resort to monopolistic practices and conspire to restrain trade in violation of the antitrust laws. Only a little over a year ago the United States Supreme Court upheld a lower court ruling and found the Sugar Institute guilty on 40 separate counts of engaging in a combination and conspiracy to restrain trade in sugar.'"

APPENDIX III.

U. S. Department of Agriculture
Production and Marketing Adm.
Caribbean Area Office
San Juan, P. R.

"Exhibit B" No. 52 *Amended*
February 10, 1949

REPORT OF SUGAR STOCKS, PRODUCTION AND DISTRIBUTION

Week ending December 31, 1948

All figures in terms of short tons of sugar 96° basis

Name of Mill	(1) 1947 Carryover Sugar	(2) 1947-48 Production as Ingged	(3) Transfers to Refineries	(4) Sugar Shipped to date	(5) Deliveries to Local Market to date	(6) Stocks on hand
Aguirre		96,549	2,696	93,847	3	(a)
Mercedita	137	60,982	61,119			
Cambalache		47,794		47,769	25	
Canovanas-Fajardo		110,239		110,226	9	(a)
Caños		28,590		28,262	328	
Coloso		47,597		47,212	384	(a)
Constancia Ponce		10,878	10,878			
Constancia Toa		28,197		28,197		
Eastern Sug. (4 mills)	110	132,629	13,428	117,337	1,974	
Ejemplo Roig (2 mills)		54,849	44,348	8,673	1,820	(a)
Eureka		27,719	3,021	24,518	180	
Guamani		9,153		8,183	954	(a)
Guánica		96,935	17,003	79,932		
Igualdad		40,394	30,257	10,126	11	
Juanita		34,121(b)		31,253	2,837	31
Lafayette	244	34,962	3,124	31,577	487	(a)
Monserrate	475	21,025	1,069	19,316	1,115	
Pellejas		6,153	6,153			
Plata		34,886		33,907	746	(a)
Plazuela		28,588		28,571	17	
Roig-Soller (2 mills)		25,168		25,055	113	
Rochelaise		9,530		9,414	116	
Rufina		25,629		25,246	383	
San Francisco		6,350	5,716		634	
San Jose		19,078		19,055	23	
San Vicente		46,597	1,200	44,398	983	(a)
Santa Bárbara		3,385	3,385			
Victoria		20,439		20,438	1	
P. R. Amer. Sug. Ref.	46		46			
Totals	1,012	1,108,416	203,443	892,512	13,143	31

a) Differences explained on reverse side in footnote for Proof.
b) Increased by 31 tons excess sugar of the 1947-48 crop reported by Central Juanita upon final liquidation of stocks in their warehouses.

U. S. Department of Agriculture
Production and Marketing Adm.
Caribbean Area Office
San Juan, P. R.

"Exhibit B1" No. 52 *Amended*
February 10, 1949

1948 REFINED AND TURBINADO SUGAR MOVEMENT (P. R.)

Week ending December 31, 1948

All figures in terms of short tons of sugar 96° basis

Name of Refinery	(1) 1947 Carryover (Refined)	(2) 1948 Production (Refined)	(3) Transfers from Raw Mills (Raws)	(4) Sugar Shipped to date (Refined)	(5) Local Deliveries to date (Refined)	(6) Stocks on hand (Refined)	(7) Raws on hand & refined in process
Aguirre		2,372	2,372	2,372			
San Francisco		902	902	752	150		
Eastern Sugar		13,428	13,428		13,428		
Guanica		15,539	15,539		15,539		
P. R. Amer. Sug. Ref. (a)		96,287(b)	96,588	82,324	13,647	234	295(c)
Roig Refining Co.		44,348	44,348	20,205	24,143(d)		
Western Sugar Refining		30,691	30,691	16,718	13,973(d)		
Total Ref. & Turb.		203,567	203,868	122,371	80,880(e)	234	295
Raws as per "Exhibit B"	1,012			892,512	13,143		31
Total Raws, Ref. & Turb.	1,012	203,567	203,868	1,014,883	94,023	234	326

(a) All figures adjusted as per final report from refinery.

(b) Includes 62 tons toll sugar.

(c) 6 tons short due to shrinkage.

(d) As per agreement between Roig Refining Co. and Western Sugar Refining Co., 535 tons of raw sugar delivered by the first to the latter and exported by Western as refined against its direct consumption allotment, have been included in Roig's local deliveries and deducted from Western's local deliveries.

(e) Includes 742 tons shipped to Virgin Islands.

APPENDIX IV.

UNITED STATES DEPARTMENT OF AGRICULTURE
PRODUCTION AND MARKETING ADMINISTRATION
SUGAR BRANCH

Washington 25, D. C.

April 25, 1947

CCC LETTER NO. 41 TO PUERTO RICAN PRODUCERS OF RAW CANE SUGAR

Subject: 1946-47 Purchase Contract Puerto Rican Raw Sugar—Releases for the manufacture of Direct Consumption Sugar for Shipment to the United States

At a meeting held in Washington, D. C., on April 14, 1947, with representatives of Puerto Rican producers of direct consumption sugar, it was pointed out that applications from raw sugar producers (hereinafter referred to as "Sellers") pursuant to CCC Letter No. 36 had been received by Commodity Credit Corporation for the release of an unusually large quantity of raw sugar for the purpose of manufacturing direct consumption sugar for shipment to the continental United States.

To adjust the releases to conform more nearly to the procedure of recent years and pursuant to Article Two of the 1946-47 Purchase Contract Puerto Rican Raw Sugar, Commodity Credit Corporation will approve releases of raw sugar to Sellers who are parties to that contract for delivery to the following manufacturers of direct consumption sugar up to the quantities shown opposite their names below:

Name of Manufacturer of Direct Consumption Sugar	1946-47 Crop Direct Consumption Sugar (short tons, raw value)
Aguirre	11,154
San Francisco	1,378
Western Sugar Refining Company	29,965
Roig Refining Company	27,183
P. R. American Sugar Refining Co.	60,320
Total	130,000

The above named manufacturers have been asked to inform Commodity Credit Corporation of the quantities of raw sugar to be purchased from each Seller of 1946-47 crop Puerto Rican raw sugar for conversion to direct consumption sugar up to the amount of the foregoing quantities. Upon receipt of this information from such manufacturers and upon receipt of revised applications from Sellers of the raw sugar, Commodity Credit Corporation will release to such Sellers the quantities it approves for the manufacture of direct consumption sugar for shipment to the United States. Revised applications for such releases should be filed under the instructions contained in CCC Letter No. 36 to Puerto Rican Producers of Raw Cane Sugar, which was sent to you under date of March 21, 1947.

Very truly yours,

JAMES H. MARSHALL,
Director
Contracting Officer, CCC.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 27

SECRETARY OF AGRICULTURE, *Petitioner*,

v.

CENTRAL ROIG REFINING COMPANY, INC., ET AL.,
Respondents

No. 30

PORTO RICAN AMERICAN SUGAR REFINERY, INC.,
Petitioner,

v.

CENTRAL ROIG REFINING COMPANY, ET AL., *Respondents*

No. 32

THE GOVERNMENT OF PUERTO RICO, *Petitioner*,

v.

SECRETARY OF AGRICULTURE, ET AL., *Respondents*

BRIEF FOR THE AMERICAN SUGAR REFINING COMPANY, ET AL., RESPONDENTS-INTERVENORS

DONALD R. RICHBERG,
Attorney for The American Sugar Refining Company, et al., Respondents-Intervenors.

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SECRETARY OF AGRICULTURE, ET AL., *Respondents*

BRIEF FOR THE AMERICAN SUGAR REFINING COMPANY, ET AL., RESPONDENTS-INTERVENORS

Preliminary Statement

The sole purpose of this brief in behalf of ten domestic sugar refining companies is to support the constitutionality

of Sec. 207(b) of the Sugar Act of 1948. The grant of the writ of certiorari on petition of the Government of Puerto Rico brings up this constitutional question as the single issue in No. 32. The same issue is presented in No. 27.

If this Court should *reverse* the judgment of the Court of Appeals and sustain the order of the Secretary of Agriculture, obviously the Court must at the same time sustain the constitutionality of the law under which the Secretary acted.

If this Court should *affirm* the judgment of the Court of Appeals, whereby the case would be remanded to the Secretary for further action under the law, such a ruling would certainly imply—or even amount to a holding—that the Sugar Act of 1948 as a whole is constitutional. However, in the absence of an express ruling as to Sec. 207(b) the contention might be made subsequently that that single provision (limiting the import of refined sugar from Puerto Rico into the United States) should be held separately invalid despite the validity of the Act as a whole.

For this reason it becomes necessary to emphasize at the outset of this brief that there is no separability clause in the Sugar Act of 1948—nor in the predecessor Acts of 1934 and 1937—and that the quota system adopted in these Acts "to protect the welfare of consumers and of those engaged in the domestic sugar industry" (Sec. 201) would fail tragically to accomplish these ends unless not only imports of *raw* sugar but also imports of *refined* sugar were definitely limited as in Sec. 207(a) from Hawaii; (b) from Puerto Rico; (c) from Virgin Islands; (d) from Philippines; (e) from Cuba. The refined sugar quotas are so closely interwoven with the raw sugar quotas that the Congress specifically provided in Sec. 207(g) that the refined sugar quotas "shall not be subject to suspension" (under Sec. 408) unless the President "acting thereunder specifically finds" that a

national emergency with respect to sugar exists which "requires" the suspension of refined sugar quotas.

Thus the attack upon the constitutionality of Sec. 207(b) is in reality an attack upon the entire Sugar Act of 1948. This Court cannot be expected to amend the Act by striking out one of its most vital provisions—the one upon which the welfare (indeed the continued existence) of the important domestic industry of sugar refining depends.[1] When petitioners question the power of the Congress under the Constitution to limit the importation of refined sugar they really question the power of the Congress to enact the comprehensive regulatory program under which for fifteen years the Congress has been able to protect the consumers, the farmers, the workers and investors in the domestic sugar industry.

Of course the Government of Puerto Rico does not wish to challenge the authority of Congress to enact any part of the Sugar Acts *except* the restriction upon Puerto Rican exports of refined sugar to the United States. Puerto Rico desires to retain the enormous benefits derived by its citizens from the Sugar Act because the guaranteed prosperity of its sugar industry (its major industry) would disappear overnight with the nullification of this legislation. What Puerto Rico seeks to accomplish is to retain all of its benefits from the regulation of *raw* sugar production and to be *individually* relieved of the limitations upon sugar refining

---

[1] The importance of the continental sugar refining industry is not determined merely by its capital value (approximately $250,000,000.), or by the large value of its products and the substantial earnings of its skilled labor or its existence for over 200 years. Its greatest importance lies in the enormous need of the American people for sugar, which had to be rationed in both World Wars. The ruin of the continental sugar refineries might well result in a sugar famine in the United States in a time of war. There would be an absolute dependence for inadequate, high priced supplies on foreign production and transportation—both being subject to interference by hostile action.

which are now imposed on *all* refiners *within as well as outside* the United States.

Such a judicial "interpretation" of the Sugar Act of 1948 would be actually a judicial amendment of the Act which it cannot be assumed that the Supreme Court would seriously consider. The real question presented to this Court is: Had the Congress power to enact the entire Act as a comprehensive program to protect the welfare of all those dependent upon an essential industry?

Factual Background of the Sugar Acts

This Court may hesitate to pass upon the constitutionality of the Sugar Act of 1948, under the "rules" set forth in the concurring opinion of Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288 (or for the reasons advanced under Point III of our Brief in Opposition to the Petitions). But, since the Petitions have been granted (and particularly the Petition of the Government of Puerto Rico) the constitutional challenge must be met; and so the conditions of the sugar industry which induced the legislation should be made evident to the Court.

These conditions, which are reviewed in greater detail in other briefs (as in the Brief for the Secretary of Agriculture), can be summarily described as follows:

1. Prior to 1934, tariff protection had failed to protect domestic sugar producers from "less-than-cost" prices, because of domestic overproduction.[2]

2. The quota system of limiting the production and marketing of sugar in or from the various producing areas was devised to stabilize the entire industry, and primarily to save producers of raw sugar from disaster.[3]

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[2] U. S. Tariff Com. Report on Sugar (1934) Rep. No. 73.

[3] President Roosevelt's Message to Congress, February 8, 1934; see Appendix A.

3. Losses from reduction of production by growers of beets and sugar cane were to be offset by benefit payments to these producers, financed by processing taxes on refining.[3]

4. Continental sugar refiners, being dependent on legally limited supplies of raw sugar, were to be saved from extinction by limiting imports of *refined* sugar from all off-shore areas and by thus giving assurance of necessary imports of *raw* sugar.[4]

5. The success of the Jones-Costigan Act of 1934, led to continuance of the same program, to stabilize the sugar industry, in the Sugar Act of 1937—and in the Sugar Act of 1948, the validity of which is now being challenged.

> "Like its predecessors, the Jones-Costigan Sugar Act of 1934 and the Sugar Act of 1937, the bill has as its primary objective the stabilization of the sugar producing, refining and importing industries." Report of House Committee on Agriculture, recommending passage of the Sugar Act of 1948; House Rept. No. 796, 80th Congress, 1st Sess. p. 1.

Summary of Argument

I. The original Sugar Act of 1934 was enacted on recommendation of the Tariff Commission and President Roosevelt to establish a quota system, controlling the production, refining and marketing of sugar "with the threefold object of keeping down the price of sugar to consumers, of providing for the retention of beet and cane farming within our continental limits, and also to provide against further expansion of this necessarily expensive industry". (President's Message to Congress, February 8, 1934.)

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[3] President Roosevelt's Message to Congress, February 8, 1934; see Appendix A.

[4] Hearings, Senate Com. on Finance, 75th Congress, on H.R. 7667, pp. 73, 75.

II. The Sugar Acts of 1934, 1937 and 1948 (all of them limiting the imports of refined sugar from Puerto Rico) have accomplished their object and have been as beneficial to consumers and all those engaged in the industry who live in Puerto Rico, as to those who live in the United States.

III. The power of Congress to enact such laws establishing sugar quotas is conceded by all present litigants. It is only the discretionary exercise of this power, in the refined sugar quota limitation, that is attacked as a violation of "due process".

IV. There is no arbitrary or unjust discrimination against citizens of Puerto Rico in the limitation upon imports into the United States of refined sugar in Sec. 207(b) of the Sugar Act of 1948.

V. The Congress has plenary power to limit the production and sale of sugar in and from Puerto Rico (which is an unincorporated territory) under Article IV, Section 3, Clause 2, of the Constitution which reads:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

VI. No person is deprived of liberty or property without due process of law by the limitation upon imports into the United States of refined sugar from Puerto Rico which is written into Sec. 207(b) of the Sugar Act of 1948. This is an essential and reasonable requirement in the comprehensive program of regulation adopted by the Congress.

VII. The challenge to the constitutionality of Sec. 207(b) is in effect a challenge to the constitutionality of the entire law, because the efficacy of the entire law would be undermined and a major amendment of the law would be effected

by a ruling that Sec. 207(b) was invalid. It is evident from the record of Congressional action that the remainder of the Act would not have been enacted, without the quota limitation which was written in Sec. 207(b).

Argument

Point I

The Sugar Act of 1934 was enacted to limit production and expansion in order to save the sugar industry from disorganization.

The original Sugar Act of 1934 was enacted because, in the words of President Roosevelt, "the disorganized state of sugar production here and in the insular regions"—called for "remedial action". So he recommended that—"the Secretary of Agriculture should be given authority to license [4a] refiners, importers and handlers to buy and sell sugar from the various producing areas only in the proportion which recent marketings of such areas bear to total United States consumption". He also pointed out that—"The application of such quotas would immediately adjust market supplies to consumption, and would provide a basis for *reduction of production* to the needs of the United States market." (Italics ours) (See Appendix A.)

It will be seen at once that the quota restrictions upon the production or marketing of *raw* sugar must have direct and immediate effects upon all refiners of sugar, and might have disastrous effects upon continental refiners in the United States if off-shore refiners were permitted to refine all the raw sugar quota produced outside the United States, and market it in the United States.[5]

[4a] Licensing was not adopted by Congress.

[5] Drastic reduction of the raw sugar supply for mainland refining, coincident with destructive competition because of the much lower costs of refining in Puerto Rico, would be inevitable. (See Report of U. S. Section Caribbean Commission, July 1948, at p. 98; also, Hearings Senate Com. on Finance, 75th Congress, on H.R. 7667, pp. 75-76).

To make this clear we point out that the total of 7,200,000 short tons of sugar was finally [6] estimated for consumption in the United States in 1948. The marketing quotas of sugar for the continental United States (as finally adjusted by the Secretary of Agriculture to take care of deficits in producing areas) were fixed under the 1948 Act as follows:

Domestic beet sugar 1,688,000 short tons.
(None of this beet sugar is available to cane sugar refiners, as the processing of beets into refined sugar is a continuous process.)
Mainland cane sugar 413,000 short tons.

In contrast, the quota allotments for continental marketing from off-shore areas were:

Hawaii	825,000	short	tons
Puerto Rico	1,024,000	"	"
Virgin Islands	6,000	"	"
Philippines	240,000	"	"
Cuba	2,940,000	"	"
Other foreign countries	64,000	"	"
Total	5,099,000	"	"

If all this off-shore sugar could have been refined in these areas before being marketed in the United States, there would have been available to continental refiners of cane sugar only 316,000 tons of raw sugar,[7] although these refineries have a capacity of 7,000,000 tons:

Hawaii and Puerto Rico had a total allotment of 1,849,000 tons, of which, under the Act, only 155,649 tons could come in as refined sugar. If all of *their* quotas could have come in as refined sugar there would have been available for continental refiners only the following amounts of raw sugar:

[6] 13 F.R. 4473, August 4, 1948.

[7] This is the 413,000 quota tons minus 97,000 tons which were processed and marketed directly by cane producers. The term "continental refiners" is used to exclude these "mainland" cane mills.

Mainland cane sugar	316,000	tons
Philippines	240,000	"
Virgin Islands	6,000	"
Cuba (2,940,000 minus 375,000 refined)	2,565,000	"
Other foreign countries (64,000 minus 9,000 refined)	55,000	"
Total (short tons)	3,182,000	"

This would have limited U. S. refiners to operating at about 45% of their refining capacity.

As a matter of fact a witness for a Puerto Rican refinery testified in the hearings on the present Act[8] that, after the *present* allowances for off-shore refiners, the amount of raw sugar normally available to the U. S. refiners is only 4,750,000 tons—or about 64% of their refining capacity.[9]

[8] Arthur Quinn, counsel for Porto Rican Sugar Refinery, Inc. in the present case. House, Com. on Agriculture Hearings, June 27, 1947, p. 87.

[9] The actual amount available in 1948 was 4,902,000 tons, slightly above the normal amount because of deficits elsewhere, as shown in the following table:

Area	Final total quota (in 1,000 short tons, raw value)	Portion marketed on mainland in refined form	Quantity available to Continental cane refineries
Domestic beet sugar	1,688	1,688	0
Mainland cane sugar	413	97	316
Hawaii	825	5	820
Puerto Rico	1,024	123	901
Virgin Islands	6	0	6
Philippines, Cuba and other foreign countries	3,244	385	2,859
Total	7,200	2,298	4,902

Notes: The final quota for the various areas which appears in the first column of figures is published in 13 Fed. Reg. 7633 (1948). The quantity of refined sugar marketed from each area is reported in Production and Marketing Administration, U. S. Department of Agriculture Release 207-49, Jan. 31, 1949, and U. S. Department of Agriculture Release 296-49, Feb. 11, 1949.)

The necessity for *some* limitation upon the importation of refined sugar in order to prevent the rapid extinction of sugar refining in the United States was obvious in 1934, is obvious today, and will be obvious as long as raw sugar quotas limit continental refiners to procuring (for refining and distributing in the domestic market) far less sugar than they have the capacity to refine.

The limitation upon Puerto Rican importation of refined sugar into the United States in the Act of 1934, and continued in the Acts of 1937 and 1948, was 126,033 tons, which was the largest amount of refined sugar exported to the United States prior to the passage of the 1934 Act. In other words Puerto Rican refiners were allowed to continue to export to the United States their maximum previous export. In contrast, U. S. refineries, which, in 1934, had substantially the same capacity as at present, were limited by quota limitations upon raw sugar to the use of 64% of their refining capacity.

President Roosevelt in 1934 asked for a law—"to provide against further expansion of this necessarily expensive industry". Certainly the Congress did not "discriminate" against Puerto Rico in providing, first, generous protection and encouragement of raw sugar production and, second, an assured, continuing market for the largest amount of refined sugar that had been previously exported.

In contrast, United States refiners—who had from 1925 to 1933 already lost 15% of their production to increased imports of refined sugar from the insular regions, and who had suffered additional heavy losses from protective policies of foreign countries and a long depression in the United States [10]—were now by law limited indefinitely to an output of about 64% of their capacity.

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[10] Testimony of Ellsworth Bunker, House Agricultural Com. Hearings, Feb. 22, 1934, p. 170.

It is a significant fact that, while refining capacity in the United States has not been increased, but (despite a reduction in the number of refineries) has been maintained by improving the plants, the refiners of Puerto Rico in reckless opposition to United States policy, have increased their refining capacity.[11] They now claim that they are "discriminated" against because they cannot further increase the size and profits of the sugar refining enterprises in Puerto Rico by strangling the sugar refining industry in the United States.

It is difficult to answer patiently such a bare-faced contention that one of the beneficiaries of a federal law of cooperation for common benefit shall be permitted to rob his compulsory associates by repudiating his express obligation not to pick their pockets!

The attempt to conceal the injustice of this Puerto Rican contention takes three forms:

First, there is an emotional attack upon the mythical "legalized monopoly" of United States sugar refiners. This is a most curious "monopoly", involving a considerable number of highly competitive large and small refineries and small processors of cane sugar, all in competition with beet sugar processors and off-shore sugar refineries. It is a most curious "monopoly", which has the entire supply of its raw materials *limited* by law and a fair price of raw materials *maintained* by law for the benefit of its *suppliers*, with a regulation of market conditions by the government specifically designed and effective to insure a fair price to *consumers*. As a result of such government controls this "legalized monopoly" is allowed to operate at

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[11] Testimony of Arthur L. Quinn, supra at p. 86: "These other companies came in and built their refineries since the freeze took place in 1933, despite the fact that it was written in the law that no more than 126,000 tons could come in from Puerto Rico; despite that fact, they have built their refineries".

only 64% of plant capacity, and is only allowed to profit by the difference between government regulated costs and government regulated prices. If this is "legalized monopoly" it is certainly a toothless variety, which no humane person would wish to pound even with a stuffed club.

Second, there is an emotional plea that the extraordinarily wealthy Puerto Rican sugar refiners should not be denied the additional values of refined sugar sales over raw sugar sales amounting to "from $18,000,000 to $26,000,000 annually".[12] The emotion oozes out of this argument when it is noted that the Puerto Rican workers who would then deprive United States workers of their jobs would be paid less than half of United States wages—and when it is pointed out that two Puerto Rican families (Roig and Seralles) who would be further enriched have, since 1934, "received over $2,000,000 from the Federal Treasury, and about $20,000,000 more as subsidies from consumers here", and "it can be estimated that they make a combined net income of between one and one-half and two million dollars a year" —and *they pay no income taxes to the United States.*[13] (See Appendix B.)

Third, we finally arrive at a legal argument to the effect that Puerto Ricans are "citizens" of the United States, entitled to all the rights and liberties of other citizens, although in fact they are not required to fulfill many of the obligations of other citizens such as the payment of federal income and excise taxes, because they are residents of an unincorporated territory. It is not surprising that Puerto Ricans wish to be given all the benefits, without carrying any of the burdens of a law of the United States, since

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[12] Brief for Central Roig in Court of Appeals, p. 35.

[13] 86 Congressional Record 8741.

that seems to be the peculiar quality of Puerto Rican "citizenship".[14]

Point II

The Sugar Acts of 1934, 1937 and 1948 have accomplished their object and have been alike beneficial in Puerto Rico and the United States.

In the brief of respondents, Central Roig and Western Sugar, filed in this Court in support of the Petition for a Writ in No. 32 (No. 585 October Term 1948) it is accurately stated (p. 7):

> "The constitutional validity of the general sugar quota provisions of the Act for the relief of the farmers and raw sugar producers is not questioned."

Indeed the Sugar Acts have had such beneficent results that none of the present litigants questions the constitutionality of the Act of 1948, as a whole, and no such question has been presented heretofore to this Court. In fact, all the briefs in the Court of Appeals testify to the benefits derived by all concerned from the quota regulation of production and marketing of sugar.

As to the effect of the Sugar Acts in Puerto Rico it is pertinent to point out that, from 1934 to 1948, Puerto Rican producers of raw sugar received in quota premiums $132,285,684., and in cash subsidies $146,444,578.—a total of direct benefits amounting to $278,730,262. A mere glance at the summary of benefits received by Puerto Rican sugar producers, presented in Appendix C, *infra*, will demonstrate what a blessing the Sugar Acts have been to Puerto Rico.

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[14] Section 252(a) of the Internal Revenue Code provides: "Any individual who is a citizen of any possession of the United States (*but not otherwise a citizen of the United States*) and who is not a resident of the United States shall be subject to taxation under this chapter only as to income derived from sources within the United States . . ." (Italics ours.)

Point III

The fundamental constitutionality of the Sugar Act of 1948 being conceded, it is only the discretionary exercise of an undoubted power of Congress that is here claimed to be invalid.

The Government of Puerto Rico, Petitioner, and Central Roig and Western Sugar, Respondents, are contending that the quota limitation upon Puerto Rican export of refined sugar to the United States is so arbitrary or discriminatory that it violates the requirement of due process of law written in the Fifth Amendment. Since, however, quota limitations on the production and marketing of *raw* sugar are conceded to be constitutional, it must follow that reasonable quota limitations upon the marketing of *refined* sugar would be constitutional. Hence, the sole arguable contention must be that this particular limitation is arbitrary or discriminatory.

The limitation cannot possibly be regarded as "arbitrary", when the purposes of the Act are understood. The quota limitations upon production and marketing of raw sugar within the United States inevitably restricted the amount available to United States refiners. If there were no restrictions on quota imports of refined sugar then offshore refiners would naturally expand their refining capacity so as to make the additional income from processing raw sugar and, by substituting more and more exports of refined sugar for raw sugar, gradually, or rapidly, strangle United States refineries, by denying to them the raw sugar which is their breath of life.

It makes no difference whether one believes that the protection of United States industry and United States workers from destructive foreign and tropical competition is or is not a wise public policy. It makes no difference whether one believes that the United States should maintain with-

in its borders adequate essential industries for the protection of its inhabitants in time of war.[15] It makes no difference whether one believes that the collection of income taxes from industries in the United States is more desirable than encouraging the growth of outside industries whose owners are not subject to United States income taxes.[16] The determination of public policy, the adoption and enforcement of economic policies to be effective throughout the United States, is solely a function of the legislative power delegated to the Congress, which is (like a State legislature)—

> "free to adopt whatever economic policy may reasonably be decided to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such a policy, or, when it is declared by the legislature to override it." *Nebbia v. New York, 291 U. S. 502, 537.*
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> "The motive of Congress in exerting the power is irrelevant to the validity of the legislation." *Mulford v. Smith, 307 U. S. 38.*
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> "Looking through the form of this plea to its essential basis we cannot fail to recognize it as an argument for invalidity because this Court disagrees with the desirability of the legislation. We rehearse the obvious when we say that our function is thus misconceived. We are not equipped to decide desirability; and a court cannot eliminate measures which do not happen to suit its tastes if it seeks to maintain a democratic system. The forum for the correction of ill-considered legislation is a responsive legislature." *Daniel v. Family S. L. Ins. Co.*, decided by this Court Feb. 28, 1949; 93 L. Ed. Adv. Op. 483.

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[15] See Note 1, p. 3, supra.

[16] Citizens of Puerto Rico are held by the Internal Revenue Bureau to be "subject to Federal income tax only upon income derived from sources within the United States, in the same manner and subject to the same conditions as *non-resident aliens.*" (Italics ours). Section 29, 252-1, Regulations 111.

The major argument against the constitutionality of Section 207(b) of the Act is that it "discriminates" against outside refineries in favor of refineries inside the United States. Whether (as we contend) there is no such "discrimination", or whether the limitation upon imports is construed as a "discrimination" for the purpose of protecting an industry within the United States from unfair and destructive competition, the limitation in either case is obviously a reasonable means of making effective a public policy which the Congress certainly had the power to adopt. Hence the Act cannot be declared to be an arbitrary or unreasonable exercise of a constitutional power.

Thus the constitutional issue is narrowed down to a simple question: Is the limitation upon the export of refined sugar to the United States such an arbitrary and unjust *discrimination* against citizens of Puerto Rico that it denies them liberty and property without due process of law, in violation of their rights as citizens of the United States?

Point IV

There is no arbitrary or unjust discrimination against Puerto Rican citizens in limiting, as in Section 207(b), their exports to the United States of refined sugar.

The Sugar Act of 1948 does not restrict Puerto Rican refiners in expansion of their plants any more (or as much) as it restricts United States refiners. The methods of restriction are different but the results are similar. The quotas of sugar production have the effect of limiting the amount of raw sugar which is available to refiners in both areas.

But, under the Act of 1934, the amount of raw sugar made available to United States refineries restricted them to operating at approximately 64% of their actual operating capacity.

In contrast to this severe restriction on United States refiners, which has been substantially maintained under the succeeding Acts of 1937 and 1948, the refineries of Puerto Rico were permitted in the 1934 Act to refine and export to the United States the largest amount of refined sugar which they had ever exported.

There is a transparent sophistry in the argument that there is "gross discrimination" in restricting Puerto Rican refiners to marketing in the United States only 126,033 tons while United States refiners can refine and market "all the quota raw sugar they could acquire within the 7,200,000 ton aggregate". (Central Roig brief in support of No. 585 in this Court, at p. 5 et seq.) As heretofore demonstrated, United States refiners cannot refine more raw sugar than they can buy and the amount they can buy is absolutely limited by the operation of the Act to a normal maximum of 4,750,000 tons which was 64% of operating capacity in 1934 and is only 64% today. In contrast the Puerto Rican refining industry of 1934 (which was then almost identical with the Porto Rican American Sugar Refinery, Inc., one of the present respondents) was allowed to refine and market 126,033 tons of refined sugar which was in 1934 the largest amount that had ever been refined in any one year.[17] Obviously there was no discrimination whatever against Puerto Rican *refiners* in the Sugar Acts of 1934 and 1937. Any "discrimination" in those Acts clearly *favored* Puerto Ricans.

Since that time, however, Central Roig (in 1937) and Western Sugar (in 1938) have expanded their raw sugar operations into the field of refined sugar and, despite the statutory limitations upon exports, have increased the aggregate capacity of the Puerto Rican refineries considera-

[17] Testimony of Arthur L. Quinn, its attorney in Senate Finance Com. Hearings, August 9, 1937, p. 128.

bly beyond the total market for refined sugar provided by domestic consumption in Puerto Rico of about 100,000 tons plus the 126,033 tons which can be exported to the United States. So the contention is now made that Puerto Ricans are being "discriminated" against because, having profited enormously at the expense of United States consumers, workers and investors, by national regulation of the sugar industry (without paying U. S. income taxes) they are not being permitted to profit further at our expense by their wilful violation[18] of the purpose of the law "to provide against further expansion of this necessarily expensive industry". (President Roosevelt's Message of Feb. 8, 1934)

This "discrimination" against persons who deliberately increased their output or capacity to produce beyond the limitations of a regulated market is a self-imposed "discrimination"—which is legal absurdity. It is as though fifty passengers, having only twenty-five reserved seat tickets, boarded a train in which all seats had been sold and then claimed that they were "discriminated" against because they were not allowed to fight for twenty-five seats with the other passengers who were sitting in the seats to which the others were legally entitled.

The charge of "discrimination" against Puerto Rican refiners as business men is so lacking in merit or even plausibility that astute counsel have sought to broaden it into a charge of discrimination against Puerto Ricans as "citizens". That is why we have the fantastic argument presented that as "citizens" Puerto Ricans have a constitutional liberty to engage in a trade, which cannot be limited by a legislative regulation of the trade. Counsel for the Goverment of Puerto Rico endeavoured to sweeten the sour flavor of such an argument by the unwarranted assumption that the production of raw sugar alone was an "industry in

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[18] See Note 11, p. 11, supra.

distress" which could be constitutionally regulated. But, they argue, the sugar refining industry (although obviously involved in the same "distress") and sales of refined sugar (which must be involved in the same "distress") cannot be regulated. Such regulation they argue, would deprive citizens of Puerto Rico of liberty and property. This apparent argument is so insubstantial that eventually we arrive at the only intelligible contention which is worthy of consideration by the Supreme Court, which is that enterprises in Puerto Rico must be given the same access to mainland markets that is given to mainland enterprises or else citizens of Puerto Rico are not given that equal protection under the laws of the United States to which they claim they are entitled under the Constitution.

There are two reasons for counsel for Puerto Rico to veil this argument with vague, emotional appeals to the "intent and spirit of the Constitution" and denials of the power of Congress "to impose upon the people of Puerto Rico—a colonial system".

The first reason is that the plenary power of Congress under Art. IV, Sec. 3, Clause 2 of the Constitution over Puerto Rico as an unincorporated territory authorizes legislation applying particularly to Puerto Rico just as the legislature of a State has the power to enact laws imposing regulations on its citizens which are not imposed on the citizens of other States.

The second reason is that the limitation of a right to do business, which might exist in the absence of a regulatory law, does not deprive any citizen of his liberty or property without due process of law. The limitation of a previous freedom is the inevitable effect of any regulatory law. The only constitutional issue arising is as to whether there was an existing evil which the legislature had the power to remedy and whether the means adopted were a reasonable

means to remedy the evil. (*West Hotel Co.* v. *Parrish*, 300 U. S. 579; *Nebbia* v. *New York*, 291 U. S. 502; *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398.)

Point V

The Congress has plenary power to limit the production and sale of sugar in and from Puerto Rico (which is an unincorporated territory, that is, a "possession" of the United States), under Article IV, Section 3, Clause 2 of the Constitution.

The challenge to the constitutionality of Sec. 207(b) of the Sugar Act of 1948, presents simply a denial of the power of the Congress to limit the importation into the United States of refined sugar from Puerto Rico.

Article IV, Section 3, Clause 2 of the Constitution provides:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

It has been settled by repeated decisions of this Court that, under this constitutional grant, the Congress has plenary power to govern the unincorporated territory—the "possession"—of Puerto Rico in any manner which it deems wise and in the public interest of the territory and of the United States.

Downes v. *Bidwell*, 182 U. S. 244
Cincinnati Soap Co. v. *U. S.*, 301 U. S. 308
Hooven & Allison Co. v. *Evatt*, 324 U. S. 652

This settled (and conceded) power to regulate the production and sale of sugar in Puerto Rico obviously extends

to *refined* as well as to *raw* sugar. The *existence* of this constitutional power cannot be seriously questioned.

> "It is no longer doubted that the United States may acquire territory by conquest or by treaty and may govern it through the exercise of the power of Congress conferred by Para. 3 of Article IV of the Constitution 'to dispose of and make all needful Rules and Regulations respecting the Territory, or other Property belonging to the United States.' Dooley v. United States, supra, 183 U. S. at 157; Dorr v. United States, 195 U. S. 138, 149; Balzac v. Porto Rico, supra, 305; Cincinnati Soap Co., v. United States, 301 U. S. 308, 323."
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> *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 673-4.

The *exercise* of this power is, of course, subject to the general limitations imposed upon the Congress by the Fifth Amendment. Accordingly, the present challenge to the constitutionality of Sec. 207(b) is laid in the contention that restrictions upon imports of refined sugar from Puerto Rico deprive Puerto Ricans of liberty or property without due process of law.

Point VI

No person is deprived of liberty or property without due process of law by the limitation of imports into the United States—as provided in Section 207(b) of the Sugar Act of 1948

There are two long established principles of constitutional law which completely dispose of the contention that the limitation upon imports of refined sugar from Puerto Rico deprive anyone of liberty or property without due process of law.

One. The Congress has absolute power to tax or limit or forbid imports from foreign countries or from unincorporated territories.

This power may be exercised either to protect domestic industries, or in aid of a program to stabilize a domestic industry (as here), or for any other purpose to protect or to promote the general welfare.

In order to arouse a prejudice against the "protection" of United States industries, the argument is here advanced that the purpose of the limitation of imports of refined sugar is to "protect" United States refiners. But this argument, if soundly based, would establish the constitutionality of the law.

In *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308 the validity of a tax on domestic processing of coconut oil from the Philippines (then an unincorporated territory like Puerto Rico) was attacked. This Court upheld the tax and held (p. 320):

> "The tax itself, it is said, was imposed for the purpose of protecting certain industries in this country; and it is challenged on that ground. That Congress has power to levy a tax with the collateral purpose of thereby protecting the industries of the United States is no longer open to doubt. *Hampton & Co. v. United States*, 276 U. S. 394, 411."

This Court further held, in the same case, that the balancing of the respective interests of the people of a territory and of the people of the continental United States was "not for judicial but for Congressional consideration and determination." (p. 320)

Surely, at this late date, the *power* of the Congress to make effective either "protective" or "free trade" economic or political policies, cannot be questioned; nor can it be anticipated that the Supreme Court will undertake to overrule the judgment of the Congress in exercising this purely *legislative* authority.

In the present case, however, the attempt to arouse a prejudice against "protective" legislation is peculiarly unfair because here we have a law designed and effective to benefit all those engaged in, or dependent upon, a large, vital industry; a law by which not only people in continental United States but also those in the territories and possessions are all "protected" from the overproduction and destructive competition which injured most of all the beet and sugar producers both inside and outside the United States.

In the present case the limitation on imports of refined sugar is an integral part of a comprehensive plan which the Congress adopted in the exercise of its several powers: to regulate interstate and foreign commerce, to levy taxes, and to govern the territories and possessions of the United States. There is a certain blind humor in the Puerto Rican position that the Congress can constitutionally regulate the production and marketing of the products of an industry which is operative in the United States, its territories, possessions and foreign countries, but cannot, as a part of that regulation, exercise the most obvious constitutional power of this, or any other, nation—to restrict imports into the country!

Of course, the humor of this contention is discreetly veiled by the implication that Puerto Rico is a part of the United States and goods from Puerto Rico are transported in "interstate" commerce and not "imported" into the United States. But, this implication does not rise to the dignity of a "legal fiction" because it is contrary to a legal fact. The legal *fact* is that Puerto Rico is a possession of, and is not a part of, the United States.[19] It *may* eventually become

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[19] See cases cited under Point V. Also note Section 3797 (a) (9) of Internal Revenue Code which reads as follows: "(9) 'United States' when

a part of the United States or *may* become a completely "foreign" country just as the Philippines were a possession of the United States and became a foreign country.[19a]

When the Philippines were still a territory—a possession of the United States, this Court pointed out, in *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, at p. 678:

> "Our tariff laws in their practical operation have in general placed merchandise brought from the Philippines into the United States in the same relationship to the constitutional taxing power of the national government and the states as articles brought here from foreign countries."

We reiterate: The absolute power of Congress to tax, limit or forbid imports from foreign countries or from unincorporated territories prevents any would-be importer from claiming that a limit on imports deprives him of any liberty or property without due process of law.

Two. The second long established principle of constitutional law which would dispose of any claim of a deprivation of liberty or property is that no person has any liberty or right of property to engage in any business to an extent or in a manner violating regulations imposed by government in the reasonable exercise of a constitutional power.

It has been heretofore demonstrated factually that a limitation upon imports of refined sugar was a necessary, integral part of the program for stabilization of the sugar industry which was adopted by the Congress, and was deliberately written into the three Sugar Acts of 1934, 1937

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used in a geographical sense includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia.

See also statement of Hon. Fernos-Isern, Resident Commissioner from Puerto Rico—that Puerto Rico is an "unincorporated territory." Cong. Record, p. A4292, June 28, 1949.

[19a] Bills to grant Puerto Rico independence are continually under consideration by Congress.

and 1948. It is utterly irrelevant to discuss *other* programs of stabilization that *might* have been adopted, or that might be more profitable to Puerto Ricans and more injurious to mainland refiners and mainland workers. This Court has no authority to revise the economic policies and programs of the Congress; and the Sugar Act of 1948 must be sustained as a valid exercise of an admitted congressional power or else nullified *in toto*. (See, Point VIII, *infra*)

> "The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power. Veazie Bank *v.* Fenno, 8 Wall. 533, 548, 19 L. Ed. 482." *United States v. F. W. Darby Lumber Co.*, 312 U. S. 100.

> "The Courts are without authority to declare such (economic) policy, or when it is declared by the legislative arm, to override it."
>
> *Nebbia* v. *People of State of New York*, 291 U. S. 502. (page 537)

Since the congressional power of regulating the sugar industry is conceded, the contention that any person is deprived of liberty or property by a reasonable limitation upon the amount of business in which he can engage (and thus exercise his "liberty" or utilize his "property") is hopelessly insupportable. It would be a pure waste of time to cite scores of decisions of this Court establishing the principle that: "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases." (*Nebbia* case, *supra*, p. 527)

> "and the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." (*Nebbia* case, *supra*, p. 525)

The fundamental reasonableness of quota restrictions upon the marketing and transportation of a product to stabilize an industry is exemplified in the regulation of the tobacco industry reviewed in the notable case of *Mulford v. Smith*, 307 U. S. 38, in which this Court held:

> "Any rule, such as that embodied in the Act, which is intended to foster, protect and conserve that commerce (interstate), or to prevent the flow of commerce from working harm to the people of the nation, is within the competence of Congress. Within these limits, the exercise of the power, the grant being unlimited in its terms, may lawfully extend to the absolute prohibition of such commerce and *a fortiori* to *limitation of the amount of a given commodity which may be transported in such commerce*. The motive of Congress in exerting the power is irrelevant to the validity of the legislation." (Italics ours)

Thus we come, at long last, to the weakest argument which is commonly made to show a denial of due process; that is the arguiment that there is "arbitrary discrimination" in a quota restriction that applies particularly to one segment of the industry. This argument is bolstered up by broad assertions that "equal protection" is an element of "due process".

The *first* answer to this claim to "equal protection" is that while—

> "Undoubtedly the exercise of the commerce power is subject to the Fifth Amendment—; but that Amendment, unlike the Fourteenth, has no equal protection clause." *Currin v. Wallace*, 306 U. S. 1.

The *second* answer is that there is no requirement of uniformity in treatment of places or commodities in exercises of the commerce power.

> "To hold that Congress in establishing its regulation is restricted to the making of uniform rules would be

to impose a limitation which the Constitution does not prescribe. There is no requirement of uniformity in connection with the commerce power (Art. I, Sec. 8, Para. 3) such as there is with respect to the power to lay duties, imposts and excises (Art. 1, Sec. 8, Para. 1). *Currin v. Wallace*, supra.

> "*Congress may choose the commodities and places* to which its regulation shall apply. Congress may consider and weigh relative situations and needs." (Italics ours) (Ibid).

See also: *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 584.

The *third* answer is that in legislating for Puerto Rico the plenary power of the Congress (heretofore established under Point V) is not subject to any limitation requiring uniformity of treatment. It should be obvious that the Congress must have the power to confer benefits or impose obligations upon Puerto Rico differing from those effective in the several states. This is precisely what was held in *Cincinnati Soap Co.* v. *United States, supra*, and other cases previously cited.

> "In exercising this power, Congress is not subject to the same constitutional limitations, as when it is legislating for the United States . . . The Constitutional restrictions on the power of Congress to deal with articles brought into the United States, do not apply to articles brought into or sent out of the Philippines." (The Philippines were then an unincorporated territory.) *Hooven & Allison Co. v. Evatt*, supra, P. 674

Thus the entire "due process" argument in this case narrows down to the contention that the limitation on imports of refined sugar is such an *unreasonable* and *arbitrary* discrimination against Puerto Ricans as to deny them liberty and property without due process of law. The reasons for this limitation are so obvious and the need for such a limitation are so clear (as heretofore shown), in order to make

effective a Congressional program for the "stabilization of the sugar producing, *refining* and *importing* industries",[20] that the claim of an *unreasonable, arbitrary* discrimination cannot possibly be supported. What the opposition to Sec. 207(b) is asking is that the Supreme Court review the *judgment* of the Congress in the exercise of an acknowledged power of the Congress, and override it. This is exactly what this Court has repeatedly, uniformly and properly declined to do. (See citations under Points V and VI).

Point VII

The challenge to the constitutionality of Sec. 207(b) is in effect a challenge to the constitutionality of the entire Act.

The absence of a separability clause in the Sugar Act of 1948 (and in preceding Acts) is clear evidence of the deliberate intention of the Congress to make the provisions of Section 207 an essential part of the legislation, in the absence of which the Act would not have been passed.

The records of Congressional hearings, heretofore cited, show that from the beginning there was some opposition in the executive department and from offshore interests to restrictions upon imports of refined sugar. In the 1934, 1937 and 1948 Acts the Congress, after full consideration of such opposition, carefully wrote into the law these restrictions.

On September 11, 1939, the President, by an emergency proclamation, suspended the operation of Title II of the Act of 1937 (Proclamation No. 2361) and then on December 26, 1939, by Proclamation No. 2378 removed this suspension "with respect to the calendar year 1940". The Act of 1937 was afterwards extended by a resolution of the Congress so as to have a termination date of December 31,

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[20] House Report No. 796. 80th Congress, 1st Sess.

1947 (Pub. No. 860, 76th Congress). In 1941 sugar came under war controls, following which the Sugar Act of 1948 was passed and approved August 8, 1947.

In the Act of 1948 there was a most significant amendment added to the Act of 1937. Under the broad suspension power in Section 509 of the Act of 1937 the President had suspended in 1939 the operation of Title II of that Act. (Title II included quotas, and limitations on raw and refined sugar marketings and imports.) The Congress gave the President a similar power of suspension in Section 408 of the Act of 1948. But, the Congress specifically limited this power to suspend the import limitations in Section 207, by adding a new paragraph to Section 207 reading as follows:

> "(g) The direct consumption portions of the quotas established pursuant to this section, and the enforcement provisions of Title II applicable thereto, shall continue in effect and shall not be subject to the provisions of Section 408 of this Act unless the President acting thereunder specifically finds and proclaims that a national economic or other emergency exists with respect to sugar or liquid sugar which requires the suspension of direct consumption portions of the quotas."

By the foregoing revision of the Act of 1937 the Congress definitely expressed its opinion that the import limitations were so essential a part of the Act that—not only could they not be suspended separately but they could not even be suspended as a part of the suspension of Title II unless the President made a special finding that such suspension was required because of a national emergency.

Although the Act of 1937 authorized the President to suspend the operation of Title II or Title III (conditional payments), the Act of 1948 only authorized suspension of Title II. But, with the proviso requiring a special finding

as to the need for suspending Sec. 207 of Title II, the Congress showed its intent to have Section 207 remain in effect even after suspension of other quota limitations, unless the President found it necessary to suspend *all* the quota and import limitations.

It is hard to conceive of a plainer demonstration of the fact that without the inclusion of import limitations the Congress would not have enacted the Sugar Act of 1948. Hence the invalidation of Section 207 or any provision thereof would nullify the entire Act of 1948; or at least all the provisions of Title II, if that title could be regarded as a separable part of the Act because of the Presidential authority given to suspend that title alone in event of a national emergency.

It is recognized that a separability clause is an aid in determining the legislative intent but "not an inexorable command". (*Dorchy* v. *Kansas*, 264 U. S. 286, 290.) However, its absence leaves in force the "presumption . . . that the legislature intends an Act to be effective as an entirety". (*Williams* v. *Standard Oil Co. of La.* 278 U. S. 235.) What a court is concerned with is the legislative intent.

> "In seeking the legislative intent, the presumption is against any mutilation of a statute, and the courts will resort to elimination only where an unconstitutional provision is interjected into a statute otherwise valid, and is so independent and separable that its removal will leave the constitutional features and purposes of the Act substantially unaffected by the process". Williams v. Standard Oil Co. of La., supra.

Summary Reply to Briefs of Government of Puerto Rico and Central Roig

The present brief, in behalf of the continental sugar refiners, is intended not to duplicate, but to supplement the Government brief for the Secretary of Agriculture in

which there is a full and adequate defense of the Sugar Act of 1948 and of its basic constitutionality.

We have sought to add to this a consideration of the particular interests of the continental sugar refiners. This is not merely a private interest in large investments and enterprises that have contributed to the welfare of the United States for over two hundred years. There is also a vital public interest in the maintenance of this essential industry within the United States, so that our country will not be very largely dependent upon off-shore enterprises, some in foreign countries and some in territories or possessions which, regardless of the citizenship of their people, are as a *geographic fact* not an integral part of the United States. Our economy should be as self sufficient as possible, particularly in a period of the world's history when international warfare has made, and may again make, the continental United States not only an "arsenal of democracy" but also a fortress within which lies the last protection of the government and people of the United States.

It is also a matter of great public interest that there should be maintained this old and valuable industry of sugar refining, which produces a large amount of direct and indirect employment, not only in the refineries, but in the shipment and distribution of their products. This industry produces not only an essential of daily living, but also a very substantial income to support the people of the United States who in turn support their Government by taxes paid from such income.

In reply to a great deal of talk about "freedom of competition" presented in the opposing briefs, we should point out that, prior to the Sugar Act of 1934 when there was unlimited competition among the growers of cane sugar and beet sugar, the continental sugar refiners could pur-

chase all the raw cane sugar they desired from any area in the world; and that the inadequate prices received by the growers then permitted the sugar refiners to sell a greater volume of sugar at lower prices than they could sell after the volume of sugar available to the refiners was drastically reduced, and as a result better prices and a better income could be had by the growers.

In order to protect the growers of cane and beet sugar in the United States and in other countries from which raw sugar was obtained, the first sugar act and the subsequent acts were passed as regulations of commerce in the United States and commerce from abroad. This serious interference with a "free competition" among the growers, by establishing quotas which limited the marketing of sugar, might have had devastating results, with unjust effects particularly upon those *already* engaged in this industry, and having far-reaching enterprises of growing, refining and distributing sugar. It was immediately obvious also that lifting the price of raw sugar by quota regulation, together with the maintenance of wages and standards of living acceptable in continental United States, would seriously restrict the competition of American refiners with cheaper sugar produced elsewhere and under tropical living standards, in addition to the limitation already placed on their competition by protected markets in other countries.

Faced with these conditions the Congress took up the difficult problem of protecting the sugar growers from destructive "free competition" and avoiding at the same time the rapid destruction of the sugar refining industry in continental United States, as a result of starving it with inadequate supplies of raw sugar. It is almost amusing to read the *defense* in the brief of the Government of Puerto Rico *of the legality and justice* of a federal law for the very purpose of preventing destructive competition among the

investors and workers in sugar plantations; and then to read the *denunciation of the legality and justice* of provisions in the same law, not merely to prevent destructive competition among the investors and workers in the sugar-refining industry, but also to prevent the industry from being starved to death because of inability to get the raw sugar supplies upon which its life depends.

In this connection it should be realized that the entire purpose of the sugar acts has been to deal fairly with *all* those engaged in the industry, so that they might save, and make profitable, their investments; and at the same time, in the language of President Roosevelt "to provide against further expansion of this necessarily expensive industry". Undoubtedly President Roosevelt's attention was directed primarily to the interests of those engaged in cane-sugar and beet sugar production, but the same philosophy and program would apply also to those engaged in sugar refining.

It was desirable to protect against destructive competition not only growers in continental United States, but also growers outside our continental boundaries to whom we look for our supplies of raw sugar; and so the sugar acts have been a boon to the growers in Cuba, which is a foreign country. But it is a strange perversion of logic to argue, as counsel for the Government of Puerto Rico argue, that a provision against "further expansion of this necessarily expensive industry" should be limited by the Congress to the *growers;* and that, when supplies of raw sugar were restricted by law, there ought to be indefinite further expansion of *refineries* competing for limited supplies, resulting in the eventual and indeed rapid destruction of one of the outstanding industries in the United States, with heavy losses of investment, employment and taxable income to be suffered by the people residing within the continental boundaries of the United States.

Apparently the injustice of the argument leads to the emphasis most strongly placed in the brief in behalf of Central Roig upon the argument that the Congress has no *power* to deal justly with the interests of the continental refiners. The claim that the Congress has no *power* is rested upon the perpetual and shaky foundation of the due process clause which has been so often the last resort in an effort to persuade this court to substitute its judgment for that of the legislature in the determination of a complicated industrial issue.

Any such restrictive legislation as that now in question must always seem to some of the persons affected, to bear unequally upon them. This apparent inequality then becomes the basis for a denunciation of "arbitrary discrimination". In the present case, however, there can be no question that there was no arbitrary discrimination against the people of Puerto Rico in the Sugar Act of 1934 since they were permitted to continue marketing on the continent as much refined sugar as they had ever marketed. So, the argument is made that it has *become* an "arbitrary discrimination" against the people of Puerto Rico not to permit them after 1934 to increase their refining and marketing in destructive competition with continental refiners who in the same law were restricted in the amount of sugar which they could refine and market on the continent by continuing limitations upon the amount of raw sugar which would be available to them.

Faced with the weakness of any argument that there was any discrimination against *individuals* engaged in the industry, the final resort of the Government of Puerto Rico is to the argument that the Congress has no power to pass a law which has the effect of preventing people in Puerto Rico from producing a product and then marketing it in the United States, despite the fact that the established policy

of the United States is to create a restricted market in this product. A curious feature of this argument is that counsel for the Government of Puerto Rico freely concede the power of the Congress to prevent persons from producing in Puerto Rico and marketing in the United States more than a limited amount of *raw* sugar. But, it is argued that the *same* power is *non-existent* when it is exerted to prevent the *same* people from producing and marketing more than a limited amount of *refined* sugar. Of course, the entire argument about "liberty to engage in a trade" becomes absurd. If the liberty to engage in a trade of producing raw sugar can be limited, so can the liberty to engage in the trade of producing refined sugar. The whole argument simmers down to the indefensible demand that the Supreme Court substitute its judgment, as to what is fair and equitable treatment of those subject to the Sugar Acts, for the judgment of the Congress.

Conclusion

It is our position that Section 207(b) is a valid exercise of the acknowledged power of Congress to enact the Sugar Act of 1948, as a comprehensive program to stabilize the sugar industry; that this section is an integral part of the Act; and that the Act as a whole is constitutional. We submit that there is no reason or legal precedent to justify the mutilation of the statute, and the thwarting of the intent of Congress in enacting it, by judicial nullification of one of its most vital provisions.

Respectfully submitted,

DONALD R. RICHBERG,
Attorney for The American Sugar Refining Company, et al., Respondents-Intervenors.

APPENDIX A

Sugar Situation

Message of the President to Congress

[Released by the White House February 8]

To the Congress:

Steadily increasing sugar production in the continental United States and in insular regions has created a price and marketing situation prejudicial to virtually everyone interested. Farmers in many areas are threatened with low prices for their beets and cane, and Cuban purchases of our goods have dwindled steadily as her shipments of sugar to this country have declined.

There is a school of thought which believes that sugar ought to be on the free list. This belief is based on the high cost of sugar to the American consuming public.

The annual gross value of the sugar crop to American beet and cane growers is approximately $60,000,000. Those who believe in the free importation of sugar say that the 2-cents-a-pound tariff is levied mostly to protect this 60-million-dollar crop and that it costs our consuming public every year more than 200 million dollars to afford this protection.

I do not at this time recommend placing sugar on the free list. I feel that we ought first to try out a system of quotas with the threefold object of keeping down the price of sugar to consumers, of providing for the retention of beet and cane farming within our continental limits, and also to provide against further expansion of this necessarily expensive industry.

Consumers have not benefited from the disorganized state of sugar production here and in the insular regions. Both the import tariff and cost of distribution, which together account for the major portion of the consumers' price for sugar, have remained relatively constant during the past 3 years.

This situation clearly calls for remedial action. I believe that we can increase the returns to our own farmers, contribute to the economic rehabilitation of Cuba, provide adequate quotas for the Philippines, Hawaii, Puerto Rico, and

the Virgin Islands, and at the same time prevent higher prices to our own consumers.

The problem is difficult but can be solved if it is met squarely and if small temporary gains are sacrificed to ultimate general advantage.

The objective may be attained most readily through amendment of existing legislation. The Agricultural Adjustment Act should be amended to make sugar beets and sugar cane basic agricultural commodities. It then will be possible to collect a processing tax on sugar, the proceeds of which will be used to compensate farmers for holding their production to the quota level. A tax of less than one half cent per pound would provide sufficient funds.

Consumers need not and should not bear this tax. It is already within the executive power to reduce the sugar tariff by an amount equal to the tax. In order to make certain that American consumers shall not bear an increased price due to this tax, Congress should provide that the rate of the processing tax shall in no event exceed the amount by which the tariff on sugar is reduced below the present rate of import duty.

By further amendment to the Agricultural Adjustment Act, the Secretary of Agriculture should be given authority to license refiners, importers, and handlers to buy and sell sugar from the various producing areas only in the proportion which recent marketings of such areas bear to total United States consumption. The average marketings of the past 3 years provide on the whole an equitable base, but the base period should be flexible enough to allow slight adjustments as between certain producing areas.

The use of such a base would allow approximately the following preliminary and temporary quotas:

	Short Tons
Continental beets	1,450,000
Louisiana and Florida	260,000
Hawaii	935,000
Puerto Rico	821,000
Philippine Islands	1,037,000
Cuba	1,944,000
Virgin Islands	5,000
	6,452,000

The application of such quotas would immediately adjust market supplies to consumption, and would provide a basis for reduction of production to the needs of the United States market.

Furthermore, in the negotiations for a new treaty between the United States and Cuba to replace the existing commercial convention, which negotiations are to be resumed immediately, favorable consideration will be given to an increase in the existing preferential on Cuban sugars, to an extent compatible with the joint interests of the two countries.

In addition to action made possible by such legislative and treaty changes, the Secretary of Agriculture already has authority to enter into codes and marketing agreements with manufacturers which would permit savings in manufacturing and distributing costs. If any agreements or codes are entered into, they should be in such form as to assure that producers and consumers share in the resulting savings.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE, *February 8, 1934.*

APPENDIX B

ESTIMATED PRICE PREMIUMS AND CASH SUBSIDIES RECEIVED BY APPELLANT ROIG'S AFFILIATES, (a) 1938–1948 (b)

Estimated Price Premiums Received on Sugar Produced in U. S. Quota Protected Market and Cash Subsidies Received in Form of Benefit Payments Under Sugar Acts of 1937 and 1948

Year (1)	Benefit Payments Made to Roig Affiliates Under Sugar Acts of 1937 and 1948 (c) (2) (dollars)	Estimate of Roig Affiliates' Production Based on Benefit Payments Received (d) (3) (short tons, raw value)	Unit Quota Premium Received (e) (4) (cents per lb.)	Estimated Total Quota Premium Received (f) (5) (dollars)	Total Estimated Direct Benefits Received Under Sugar Act of 1937 (Sum of Estimated Quota Premiums and Cash Subsidies) (g) (6) (dollars)
1938	332,885	36,273	.896	650,012	982,897
1939	295,605	30,059	.315	189,372	484,977
1940	313,814	33,094	.556	368,005	681,819
1941	308,784	32,256	.628	405,135	713,919
1942	338,969	36,487	0	0	338,969
1943	315,892	32,640	0	0	315,892
1944	261,012	25,890	0	0	261,012
1945	320,596	33,424	0	0	320,596
1946	330,259	35,035	0	0	330,259
1947	342,040	36,998	0	0	342,040
1948	378,696	43,107	.415	357,788	736,484
Totals	3,538,552			1,970,312	5,508,864 (h)

(a) Centrals Roig and El Ejemplo.
(b) Data respecting benefit payments to individual growers not available for 1935 and 1936, and since no benefit payments were made in 1934 and 1937, the period 1934–1937 has been omitted from this table.
(c) Received directly from Sugar Branch, Production and Marketing Administration, U. S. Dept. of Agriculture.
(d) Estimates of production interpolated from reported total payments on basis of unit payment scale contained in Section 304 (c) of the Sugar Acts of 1937 and 1948.
(e) From Appendix C, column 6.
(f) Obtained by multiplying column 3 by unit premium (column 4 converted to the short ton equivalent).
(g) Sum of columns 2 and 5.
(h) Benefit payments received by Roig in 1935 and 1936, and quota premiums received by Roig in 1934–1937, inclusive, are not included. Accordingly, the figure of $5,508,864 does not represent the total amount of direct benefits received by Roig under the sugar control statutes.

(Here follows Exhibit C.)

APPENDIX C

Price Premiums and Cash Subsidies Received by Puerto Rican Raw Sugar Producers, 1934–1948

Sales in U. S. Tariff-Quota Protected Market and Cash Subsidies Received in Form of Benefit Payments Under Sugar Acts of 1934, 1937 and 1948

Year	Average Price of Raw Sugar in U. S. Market (Duty-Paid N. Y. Basis) (a)	Average Price of Raw Sugar in World Market (Converted to N. Y. Basis) (b)	Unit Price Premiums Received on Sales in U. S. Tariff-Quota Protected Market: Unit Price Premium Received (c)	Unit Tariff Premium Received (Average Cuban Duty) (d)	Unit Quota Premium Received (e)	Sales of Puerto Rican Sugar in U. S. Market (f)	Total Price Premium Received (g)	Total Tariff Premium Received (h)	Total Quota Premium Received (i)	Total Cash Subsidies Received (Benefit Payments Under Sugar Acts) (j)	Total Direct Benefits Received Under Sugar Acts (Sum of Quota Premiums and Cash Subsidies) (k)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)
	(cents per lb.)	(cents per lb.)	(cents per lb.)	(cents per lb.)	(cents p	(short tons, raw value)	(dollars)	(dollars)	(dollars)	(dollars)	(dollars)
1934	3.019	1.04	1.979	1.52	45	807,381	31,956,140	24,544,382	7,411,758		7,411,758
1935	3.231	1.00	2.231	.90	1.34	793,177	35,391,558	14,277,186	21,114,372	1,658,880	22,773,252
1936	3.594	1.02	2.574	.90	1.67	907,238	46,704,612	16,330,284	30,374,328	12,774,272	43,148,600
1937	3.443	1.32	2.123	.90	1.22	806,340	38,058,596	16,134,120	21,924,476		21,924,476
1938	2.936	1.14	1.796	.90	.80	815,294	29,285,360	14,675,292	14,610,068	9,502,122	24,112,190
1939	2.982	1.59	1.392	1.077	.31	1,125,844	31,343,497	24,250,680	7,092,817	8,871,084	15,963,901
1940	2.786	1.33	1.456	.90	.55	798,316	23,246,962	14,369,688	8,877,274	10,617,743	19,495,017
1941	3.378	1.85	1.528	.90	.62	992,933	30,344,032	17,872,794	12,471,238	9,566,735	22,037,973
1942	3.739	(b)	.751 (c)	.751	6	836,225	12,560,100	12,560,100	0	11,231,588	11,231,588
1943	3.740	(b)	.750 (c)	.75	0	880,153	13,202,295	13,202,295	0	13,122,990	13,122,990
1944	3.743	(b)	.750 (c)	.75	0	743,308	11,149,620	11,149,620	0	12,214,038	12,214,038
1945	3.750	(b)	.750 (c)	.75	0	902,660	13,539,900	13,539,900	0	13,061,033	13,061,033
1946	4.589	(b)	.750 (c)	.75	0	866,914	13,003,710	13,003,710	0	13,271,249	13,271,249
1947	6.217	(b)	.750 (c)	.75	0	968,545	14,528,175	14,528,175	0	15,060,552	15,060,552
1948	5.545	4.63	.915	.50	.41	1,013,175	18,541,103	10,131,750	8,409,353	15,492,292	23,901,645
Totals							362,855,660	230,569,976	132,285,684	140,444,578	278,730,262

(a) *Lamborn Sugar-Market Report*, May 3, 1949.

(b) *The World Sugar Situation*, August, 1944, U. S. Dept. of Agriculture for 1934–1941; 1948 figure computed from ... States Government's purchase of the bulk of Cuba's crops for distribution and resale to other countries, ...

(c) Difference between columns 2 and 3. The unit price premiums received for the years 1942–1947 represent ...

(d) Inasmuch as the total price premium is attributable to some extent to the duty on foreign sugar, in comput... all dutiable raw sugar imported into the United States comes from Cuba which, in the absence of tariff an... duty rate, has been deducted in making the adjustment. For the years 1934, 1939 and 1942 when change... years has been used.

(e) Difference between columns 4 and 5. The unit price premium received in 1942 through 1947 was the unit ...

(f) Official charges against U. S. quotas:
For 1934–1936, *Statistics on Receipts and Distribution of Sugar in the United States, 1931–39*, Statistical Bull...
For 1937–1941, *Final Charges Against Sugar Quotas, 1937–1944*, U. S. Dept. of Agriculture Release, Dece...
For 1942–1947, *Sugar Reports No. 2*, U. S. Dept. of Agriculture, July 28, 1948. Figure for 1943 includes 2... sugar actually shipped to the United States.
For 1948, *Sugar Reports No. 5*, U. S. Dept. of Agriculture, July 7, 1949.

(g) Obtained by multiplying sales (column 7) by unit premium (column 4 converted to the short ton equivalent).

(h) Obtained by multiplying sales (column 7) by unit premium (column 5 converted to the short ton equivalent).

(i) Obtained by multiplying sales (column 7) by unit premium (column 6 converted to the short ton equivalent).

(j) Obtained directly from Sugar Branch, Production and Marketing Administration, U. S. Dept. of Agriculture.

(k) Obtained by adding column 10 and column 11.

Price Premiums Received on Sales in U. S. Tariff-Quota Protected Market

Unit Price Premium Received (c)	Unit Tariff Premium Received (Average Cuban Duty) (d)	Unit Quota Premium Received (e)
(4)	(5)	(6)
(cents per lb.)	(cents per lb.)	(cents per lb.)
1.979	1.52	.459
2.231	.90	1.331
2.574	.90	1.674
2.123	.90	1.223
1.796	.90	.896
1.392	1.077	.315
1.456	.90	.556
1.528	.90	.628
.751 (c)	.751	0
.750 (c)	.75	0
.750 (c)	.75	0
.750 (c)	.75	0
.750 (c)	.75	0
.750 (c)	.75	0
.915	.50	.415

...riculture for 1934–1941; 1948 figure computed from data in *Lamborn Sugar-Market Report*, March 15, 1949. Because of the disruption of normal markets during the war, and the United... ...ts for distribution and resale to other countries, no world market price as such is recognized for the period from 1942 through 1947.

...iums received for the years 1942–1947 represent the unit tariff premiums only.

...e extent to the duty on foreign sugar, in computing that portion of the price premium attributable to the quota system, allowance has been made for the duty factor. Since virtually ...omes from Cuba which, in the absence of tariff and quota protection, is capable of supplying the United States' imports in full, the rate of duty on Cuban sugar, rather than the full ... For the years 1934, 1939 and 1942 when changes in the rate of duty were made, the average rate of duty based on a simple averaging of rates in effect each day of the respective ...

...ium received in 1942 through 1947 was the unit tariff premium only since quotas were in suspension.

...*Sugar in the United States, 1931–39*, Statistical Bulletin No. 77, U. S. Dept. of Agriculture, September, 1942.
...*7–1944*, U. S. Dept. of Agriculture Release, December 20, 1945.
...ulture, July 28, 1948. Figure for 1943 includes 238,277 tons shipped to United Kingdom (Indian exchange arrangement to conserve shipping) which received same price premiums as ...

..., July 7, 1949.
... (column 4 converted to the short ton equivalent).
... (column 5 converted to the short ton equivalent).
... (column 6 converted to the short ton equivalent).
...keting Administration, U. S. Dept. of Agriculture.